Supreme Court, U.S.
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IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO.,

Petitioner,

v.

FLORENCE KENYON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FLOYD J. KENYON, SR.,

Respondent.

On Petition for a Writ of Certiorari to the Florida Second District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state law permitting a jury to impose liability on tobacco companies for the mere manufacture and sale of cigarettes, without more, conflicts with and is preempted by congressional policy allowing the production and sale of cigarettes in the United States.

PARTIES TO THE PROCEEDING

Petitioner is R.J. Reynolds Tobacco Company. R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., formerly known as RJR Nabisco, Inc. On December 11, 2000, R.J. Reynolds Tobacco Holdings, Inc. acquired Nabisco Group Holdings Corp, now a wholly-owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., renamed RJR Acquisition Corp. Since June 15, 1999, R.J. Reynolds Tobacco Holdings, Inc. has been a publicly-owned corporation. Before then, RJR Nabisco, Inc. was a wholly owned subsidiary of RJR Nabisco Holdings Corp., a publicly owned corporation. RJR Nabisco Holdings Corp. is now Nabisco Group Holdings Corp., and since June 14, 1999, has *not* held a direct or indirect ownership interest in R.J. Reynolds Tobacco Holdings, Inc. or R.J. Reynolds Tobacco Company.

Fidelity Management & Research and Capital Research and Management each own more than 10 percent of the publicly traded stock of R.J. Reynolds Tobacco Holdings, Inc.

R.J. Reynolds Tobacco Holdings, Inc. recently announced that it is seeking a potential corporate transaction with another tobacco holdings company. A copy of its press release is included as part of the appendix to this petition. *See* Pet. App. 63a-69a.

Respondent is Florence Kenyon acting individually and as a representative of the estate of Floyd J. Kenyon, Sr.

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OPINIONS BELOW

The Florida Second District Court of Appeal's *per curiam* order (Pet. App. 2a) was issued without opinion and is unreported. The Florida Circuit Court for the Thirteenth Judicial Circuit's decision (*id.* at 3a-4a, 17a, 25a) was also issued without opinion and is unreported.

JURISDICTION

On May 30, 2003, the Florida Second District Court of Appeal issued a one-word *per curiam* order—"Affirmed"—rejecting petitioner's preemption argument. Pet. App. 2a. It subsequently denied a timely filed petition for rehearing, rehearing *en banc*, and issuance of a written opinion on August 8, 2003. *Id.* at 1a. Because the Florida Supreme Court does not have jurisdiction under the Florida Constitution to review *per curiam* orders of the District Court of Appeal rendered without opinion, *see Jenkins v. Florida*, 385 So. 2d 1356, 1359 (Fla. 1980) (recognizing limitation on Florida Supreme Court's jurisdiction), the intermediate appellate court is the highest state court in which judgment could have been had. *See Williams v. Florida*, 399 U.S. 78, 80 n.5 (1970) (reviewing Florida District Court of Appeal decision on this ground); Stern & Gressman, SUPREME COURT PRACTICE 166 & n.48 (8th ed. 2002). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257(a).[1]

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[1] On September 5, 2003, Reynolds filed a petition with the Florida Supreme Court under the court's all writs jurisdiction seeking an order to compel the Florida Second District Court of Appeal to publish a written opinion explaining its reasons for decision. This motion seeks extraordinary relief and does not alter the fact that the judgment below is final and unreviewable as a matter of state law and a final disposition by the highest Florida court within the meaning of 28 U.S.C. §1257(a). Reynolds will advise the Court of the Florida Supreme Court's decision on this petition when one is issued.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

STATEMENT

This case involves the Florida courts' blatant disregard of this Court's precedent on a recurring federal question of tremendous importance. In the proceedings below, the Florida Circuit Court for the Thirteenth Judicial Circuit and the Second District Court of Appeal, without any explanation whatsoever, permitted cigarette manufacturers to be held liable under state tort law for merely manufacturing cigarettes, because cigarettes are supposedly inherently dangerous. As this Court has made clear, however, the manufacture of cigarettes cannot be rendered unlawful or banned as a matter of federal policy. Accordingly, to the extent Florida law forces a cigarette manufacturer to cease cigarette production or face potential tort liability, it conflicts with a federal objective and is preempted.

1. For nearly forty years, Congress has extensively regulated tobacco products, enacting six separate pieces of legislation to address tobacco use and human health since 1965. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282; Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87; Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200; Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L.

No. 99-252, 100 Stat. 30; Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 394.

Despite its comprehensive regulation of tobacco products, Congress has never ordered a ban of cigarette manufacturing or sought to prohibit the sale of tobacco products in the United States. To the contrary, Congress has provided in the United States Code that "[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare." 7 U.S.C. § 1311(a). Other sections of the Code expressly recognize Congress's decision to protect both public health and "commerce and the national economy" by requiring that cigarette manufacturers "adequately infor[m] [consumers] about any adverse health effects" from tobacco use in lieu of prohibiting the sale of tobacco products. 15 U.S.C. § 1331.

In light of Congress's long-standing decision to regulate tobacco products instead of banning them and its decision to protect "commerce and the national economy . . . to the maximum extent" in connection with tobacco regulation, this Court has concluded that "Congress . . . has foreclosed the removal of tobacco products from the market." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000). "A ban of tobacco products . . . would therefore plainly contradict congressional policy." *Id.* at 138-39.

2. Petitioner R.J. Reynolds Tobacco Company ("Reynolds") is the second-largest tobacco manufacturer in the United States and produces the Winston, Camel, Salem, and Doral cigarette brands. Respondent is Florence Kenyon, acting individually and on behalf of the estate of Floyd J. Kenyon, Sr. ("Kenyon"). Kenyon began smoking in 1942. Until the early 1970s, Kenyon smoked Camel cigarettes, but at that time he switched to Salem cigarettes. In 1982, Kenyon largely quit smoking, and in 1992, he quit smoking

altogether. Kenyon was diagnosed with lung cancer in April 2000, and just recently died.

3. In July 2000, Kenyon and his wife, Florence Kenyon, filed this action against Reynolds, alleging that Kenyon had contracted lung cancer as a result of smoking Reynolds' cigarettes. Kenyon sought actual and punitive damages for negligence and strict liability, and Mrs. Kenyon sought damages for loss of consortium. Kenyon's negligence and strict liability claims were both premised on two theories of recovery—Reynolds' failure to warn him of the health risks of smoking, and Reynolds' defective design of its cigarettes.

On October 5, 2001, Reynolds moved for partial summary judgment on preemption grounds. With respect to the failure to warn claims, Reynolds argued that the Federal Cigarette Labeling and Advertising Act ("FCLAA") expressly preempted Kenyon's claims based on conduct that occurred after 1969. In addition, Reynolds argued that the doctrine of conflict preemption precluded the design defect claims to the extent they were based *solely* on Reynolds' manufacture and sale of cigarettes, without more.

On October 25, 2001, the Florida Circuit Court for the Thirteenth Judicial Circuit granted the motion for partial summary judgment with respect to Kenyon's post-1969 negligence and strict liability claims for failure to warn. Pet. App. 8a-9a. On Reynolds' conflict preemption argument, however, the circuit court concluded that conflict preemption was not "a summary judgment issue as much as a burden issue that's more appropriately addressed in the jury instructions." *Id.* at 47a.

4. Accordingly, Reynolds submitted the following jury instruction to prevent the jury from finding for Kenyon on a preempted claim:

> I instruct you that Congress has determined that it is legal for Reynolds to manufacture, sell and advertise cigarettes

> notwithstanding the fact that cigarettes may be dangerous and addictive. Accordingly, I hereby instruct you as a matter of law that Reynolds cannot be held liable to the plaintiffs merely because it manufactured, sold, and advertised the cigarettes that Mr. Kenyon allegedly smoked.

Pet. App. 49a. Kenyon objected, arguing that the standard Florida jury instruction on negligence and strict liability was all Florida law required. *Id.* at 42a-44a.

The trial court, over Reynolds' objection (*id.* at 25a), rejected Reynolds' proposed instruction. Although the court did not publish any opinion on the issue, it explained at the charging conference that it felt compelled to adopt the Florida jury instructions that were used in *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000), *cert. denied*, 533 U.S. 950 (2001), which the court believed implicitly suggested that cigarettes were legal products:

> I think that the way the instruction is currently crafted, articulating the standards under state law by its very nature recognizes the fact that products manufactured were manufactured legally by your [client]; and I see no other way to address that issue other than to give the instructions as they're written.
>
> So, I appreciate the argument. I appreciate it down the road, but I won't give that instruction. I'll leave the instruction as it is.

Pet. App. 28a-29a. The court's resulting erroneous instruction is reproduced in the appendix to this petition. *Id.* at 10a-12a.

Unsurprisingly in light of the court's summary judgment decision and instruction, Kenyon's counsel argued throughout the trial as if Reynolds could be held liable simply for manufacturing and selling cigarettes. For example, when cross-examining the only Reynolds'

employee to testify, Dr. David Townsend, Kenyon's counsel repeatedly elicited testimony to establish that no cigarette is safe:

> Q. You said cigarettes are risky, right?
>
> A. Many times.
>
> Q. In fact, I believe you testified there's no such thing as a safe cigarette?
>
> A. I didn't say that yesterday. I have said that many times, and not just in court.
>
> Q. And—so, Reynolds' position is, in fact, that there is no safe cigarette?
>
> A. Absolutely. There is no safe cigarette. What we've tried to do at Reynolds, however, is reduce the risk. But we'll be the first to tell you there is no safe cigarette—completely safe.

Pet. App. 37a-38a; *see also id.* at 34a (asking whether it was "true that Reynolds cannot demonstrate that the cigarette is safe for its intended use," and eliciting the response, "[i]n a general sense, that is a true statement."). Kenyon's counsel later asked whether a "cigarette is inherently dangerous," to which Dr. Townsend replied:

> That's exactly what I testified. There are inherent strong risks from any cigarette. No cigarette is safe. And furthermore there is no way if we develop a cigarette that completely eliminates the risks . . . there is no way to definitively prove . . . . that the cigarette would be completely safe. There is no safe cigarette.

Id.

During the cross-examination of Dr. Townsend, Kenyon's counsel further suggested that Reynolds had "chosen" liability by "choosing" to participate in the tobacco business:

> Q: And the products that Reynolds designs and manufactures are the choice of Reynolds, aren't they?
>
> A: I don't understand your question. What do you mean "choice"?
>
> Q: Well, doesn't Reynolds choose to make the products it does?
>
> A. We choose to make a number of products that we then put on the market. Ultimately, it's the consumer that makes the choice about whether they stay on the market.

Id. at 37a. And later during the cross-examination, counsel indicated that Reynolds could have avoided liability by manufacturing nicotine gum instead of cigarettes:

> Q. Does Reynolds make a pack of 20 pieces of gum that it sells for a couple of bucks?
>
> A. Of course not.

Id. at 34a-35a.

Playing on this theme that cigarettes are so inherently dangerous that Reynolds should never have manufactured them, Kenyon's counsel described his argument as follows: Kenyon "was injured by a defective product" that "shouldn't have been available to him in the form that they were in. Period." Pet. App. 26a. During closing, Kenyon's counsel told the jury to "think of two things that Dr. Townsend said: One, a cigarette is inherently dangerous; and two, it's not safe for its intended use. A cigarette is not safe for its intended use. If it's inherently dangerous and not fit for its intended use, it's unreasonably dangerous and defective." *Id.* at 21a. He further claimed that nicotine in cigarettes was addictive and "made people smoke," but Reynolds "didn't do anything about it because they wanted to stay in the conventional cigarette business as long as they could." *Id.* at 23a. Kenyon's counsel also took advantage of the erroneous instruction on strict liability to argue that cigarettes are,

without more, so inherently dangerous as to justify the imposition of tort liability:

> "A product may also be unreasonably dangerous if the risk of danger outweighs the benefit." Well, so, you have to say, "What's the benefit of a cigarette?" Most people tell you people don't smoke—don't ever tell you. What's the benefit of that? There isn't any. So the risk of danger would outweigh—it would simply outweigh whatever benefit you get from the cigarette.

Id. at 22a.

After the close of Kenyon's case, on November 21, 2001, Reynolds filed a motion for directed verdict and a new trial, arguing that Kenyon had submitted no evidence suggesting that an alternative cigarette design was available or that Kenyon would have chosen an alternative cigarette. Pet. App. 14a-15a. Rather, Kenyon relied on the preempted strict liability claim that Reynolds could be held liable simply for manufacturing and selling cigarettes. *Id.* The court denied this motion without opinion. *Id.* at 17a-19a.

5. On December 12, 2001, the jury rendered a verdict finding in Reynolds' favor on all claims *except* strict liability for defective cigarette design. Pet. App. 5a-7a With respect to strict liability, the jury awarded Kenyon $165,000 for his medical expenses. *Id.* at 7a. The court entered final judgment on December 18, 2001. *Id.* at 3a-4a.

6. Reynolds timely filed a notice of appeal on March 28, 2002, and asked for reversal, again on the ground that Kenyon's strict liability claim was conflict preempted. On May 30, 2003, the Florida Second District Court of Appeal affirmed the lower court's decision without opinion in a *per curiam* order. Pet. App. 2a. On August 8, 2003, the court denied Reynolds' motion for rehearing, rehearing *en banc*, and issuance of a written opinion. *Id.* at 1a.

REASONS FOR GRANTING THE WRIT

The Florida Second District Court of Appeal's decision affirmed the imposition of liability on a cigarette manufacturer for merely participating in the business of producing and selling cigarettes without more. If allowed to stand, this ruling will effectively force cigarette manufacturers to choose between exiting the tobacco-products business in Florida or facing potentially massive state tort liability. For this reason, the decision is an affront to Congress's determination that cigarettes cannot be prohibited as a matter of federal economic policy and flatly contradicts this Court's preemption and tobacco-regulation jurisprudence. In addition, the ruling is inconsistent with other state and federal decisions regarding conflict preemption.

This Court should correct, indeed should summarily reverse, the erroneous decision of the Florida Second District Court of Appeal. Absent this Court's intervention, the literally thousands of cases pending against cigarette manufacturers in Florida could be prosecuted as if mere participation in the cigarette business, without more, is tortious. This would create the possibility of a *de facto* ban on cigarette manufacturing and sales in the State of Florida.

I. THE FLORIDA SECOND DISTRICT COURT OF APPEAL'S DECISION CONFLICTS DIRECTLY WITH CONGRESSIONAL POLICY AND THIS COURT'S JURISPRUDENCE.

Contrary to the lower court's decision, this Court's cases compel the conclusion that cigarette manufacturers cannot be liable for the mere manufacture and sale of cigarettes, as such a result would conflict with federal policy and objectives.

Just three years ago, in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000),

this Court confirmed that Congress has so "foreclosed the removal of tobacco products from the market" that cigarette manufacturers must be allowed to sell their product. *Id.* at 137. In that case, the Food and Drug Administration ("FDA") asserted that it had the authority to regulate tobacco products. The Court resoundingly rejected this argument in part because FDA regulations would have required a ban of cigarette and smokeless tobacco sales, in contravention of Congress's determination that tobacco products must be allowed to remain on the market in the interest of the national economy. *Id.* at 137-38.

In the Court's view, Congress had clearly demonstrated its intent to permit the manufacture and sale of tobacco products by providing in the United States Code that "'[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.'" *Id.* at 137 (quoting 7 U.S.C. § 1311(a)). In addition, Congress's extensive regulation of tobacco products, at a time when the potential ill-effects of tobacco use were known, compelled the conclusion that Congress meant to keep the products on the market:

> When Congress enacted these statutes [regulating tobacco], the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects. Nonetheless, Congress stopped well short of ordering a ban. Instead, it has generally regulated the labeling and advertisement of tobacco products, expressly providing that it is the policy of Congress that "commerce and the national economy may be . . . protected to the maximum extent consistent with" consumers "being adequately informed about any adverse health effects." 15 U.S.C. § 1331. ***Congress' decisions to regulate labeling and advertising and to adopt the express policy of protecting "commerce and the national economy to the***

> *maximum extent" reveal its intent that tobacco products remain on the market. Indeed, the collective premise of these statues is that cigarettes and smokeless tobacco will continue to be sold in the United States. A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.*

Brown & Williamson, 529 U.S. at 138-39 (internal citations omitted) (emphasis added).

Only a few months after issuing its decision in *Brown & Williamson*, indeed in the same Term, this Court also concluded that States cannot undercut federal policy by imposing tort liability on a manufacturing practice that Congress has sanctioned in order to promote a national objective.

Specifically, in *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000), Alexis Geier, who was seriously injured after the Honda Accord she was driving collided with a tree, sued Honda under state tort law claiming that her injuries were the result of Honda's failure to include airbags or other passive restraint devices in the car. *Id.* at 865. The Court concluded that Geier's "'no airbag' lawsuit" was preempted because it "conflict[ed] with the objectives of [federal regulations]." *Id.* at 866.

If allowed to proceed, the Court explained, Geier's claim would have frustrated a federal regulatory scheme—namely, Department of Transportation regulations that permitted automobile manufacturers to install airbags, other passive restraints or manual restraint devices at their discretion. This federal policy embodied the "judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Id.* at 881 (quoting brief of United States) (emphasis in original). But Geier's tort action "depend[ed] upon its claim that manufacturers had a duty to install an airbag." *Id.* Geier's suit thereby "presented an

obstacle to the variety and mix of devices that the federal regulation sought," and was preempted.

Taken together, *Brown & Williamson* and *Geier* unambiguously demonstrate that any state law or rule that permits the imposition of liability simply for the manufacture and sale of cigarettes, without some specific defect in the particular cigarette at issue, is preempted. *Brown & Williamson* holds that, while tobacco products may be extensively regulated, their manufacture and sale *cannot* be prohibited in light of federal policy permitting cigarette production as necessary to the national economy. *Geier*, moreover, holds that state tort law is preempted and stands as an obstacle to the fulfillment of federal policy objectives when it imposes liability on a manufacturing practice that Congress has sanctioned. Thus, together, these decisions confirm that States cannot impose tort liability based simply on the manufacture and sale of cigarettes, because doing so would conflict with Congress's policy of allowing cigarette sales to promote economic stability.

Kenyon was permitted to recover, however, precisely under this rationale. Reynolds sought summary judgment, a directed verdict, and special jury instructions on the ground that Kenyon's strict liability claim—a claim based on Reynolds' participation in the cigarette industry—was preempted. But the circuit court refused to even consider this argument, rejecting it out of hand. Kenyon prosecuted his case as if the issue were whether cigarettes are so inherently dangerous that their manufacture and sale, without more, violates tort law. The jury responded by finding Reynolds liable on one claim only, this strict liability claim.

As a result, the trial court permitted Kenyon to recover on the basis of the jury's determination that cigarette manufacturers have a duty to refrain from manufacturing and selling cigarettes because cigarettes are inherently dangerous and defective. But this determination effectively requires cigarette manufacturers to stop making cigarettes or face

staggering liability. As such, the tort liability imposed below is an obstacle to the fulfillment of Congress's policy to regulate *but ultimately permit* the sale of tobacco products so that "commerce and the national economy may be . . . protected to the maximum extent." 15 U.S.C. § 1331; *Brown & Williamson*, 529 U.S. at 138-39.

Indeed, by affirming the jury's decision to impose liability for cigarette manufacturing and sales, the Florida Second District Court of Appeal's decision could effectively operate as a *de facto* ban on cigarette products. Under its approach, a manufacturer can be held liable, even if it adheres to every statute and regulation governing tobacco products and every other duty imposed by tort law, simply because it sold a lawful product, cigarettes. Only complete abstention from the manufacture and sale of this product would satisfy the lower court. As this Court has recognized, however, such a *de facto* ban "would . . . plainly contradict congressional policy." *Brown & Williamson*, 529 U.S. at 138-39.

Because the Florida Second District Court of Appeal did not provide reasons for its decision, it is difficult to discern why it failed to follow *Brown & Williamson* and *Geier*. Presumably, the lower court did not publish its views on the issue because it fully endorsed Kenyon's argument below. That is, the lower court surely would have written an opinion if it intended to adopt a novel reason for its decision—particularly one not addressed by the parties. Its failure to do so thus strongly suggests that the court was persuaded by Kenyon's argument. Kenyon's argument to the lower court, however, is flatly contrary to this Court's precedent.

In the Florida Second District Court of Appeal, Kenyon argued that there is no conflict preemption doctrine in tobacco cases, because all preemption issues in this area are governed by this Court's decision in *Cipollone*:

> The preemption doctrine does not concern cigarette design but relates to restrictions on their advertising and

> promotion. The controlling decision on the preemption of state law tort claims against cigarette manufacturers is *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ("*Cipollone*"). *Cipollone* adopted a straightforward test for determining whether a particular state law tort claim was preempted by federal regulation of the tobacco industry.

Pet. App. 52a. Kenyon then characterized *Cipollone* as requiring only one preemption inquiry in tobacco cases—"whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" *Id.* (quoting *Cipollone*, 505 U.S. at 523-24)). Kenyon's counsel urged the lower court to disregard conflict preemption principles, claiming that "any argument that Reynolds might make that these precedents are inapplicable because it is relying on 'conflict preemption' rather than express preemption has been expressly foreclosed by no less an authority than the United States Supreme Court—twice." Pet. App. 53a.

For support, Kenyon cited this Court's statement in *Cipollone* that "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue," the court need not "infer congressional intent to pre-empt state laws from the substantive provisions of the legislation," and also cited *Cipollone*'s statement that there is no "inherent conflict" between "preemption of state warning requirements and the continued viability of state-common law damage actions." Pet. App. 53a-54a (quoting *Cipollone*, 505 U.S. at 517, 518)). In addition, Kenyon's counsel cited *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-88 (1995), for the proposition that this quoted language from *Cipollone* "amounted to a blanket holding that implied or conflict preemption could never exist when Congress had chosen to

include an express preemption clause in a statute." Pet. App. 54a.

Kenyon concluded: "In short, with respect to tobacco, the doctrine of conflict preemption may not be used to extend the preemption expressly provided by statute." *Id.* *See also id.* at 16a-17a (making same argument to the circuit court).

This argument is demonstrably wrong.[2] This Court considered in *Geier* the impact that express preemption clauses and savings clauses have on conflict preemption principles and concluded that the existence of an express preemption provision, and even a savings clause, does not preclude the application of conflict preemption principles:

> Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the

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[2] In other proceedings, Kenyon's counsel has argued that by denying *certoriari* in *Carter v Brown & Williamson Tobacco Co.*, 533 U.S. 950 (2001)—a case involving express preemption and the meaning of *Cipollone*—this Court held that only express preemption applies in tobacco cases. This argument is erroneous because *Carter* had nothing to say about conflict preemption at all, *see* 778 So. 2d 932 (Fla. 2000), the petitioner in *Carter* did not seek review of any conflict preemption issue, and the Court's decision to deny *certiorari* said nothing about the merits of the *Carter* decision whatsoever. *See Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of the petition for *certiorari*) ("Inasmuch, therefore, as all that a denial of a petition for a writ of *certiorari* means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.").

> presence of the very . . . requirements that federal law requires.

529 U.S. at 871. Tellingly, Kenyon's counsel never cited *Geier* in its discussion of conflict preemption. Nor did counsel explain why *Geier* should have no application in the tobacco context. It is inescapable, however, that the *Geier* decision completely eviscerates Kenyon's argument below and the lower court's implied rationale.

II. THE FLORIDA SECOND DISTRICT COURT OF APPEAL'S DECISION IS INCONSISTENT WITH THE DECISIONS OF EVERY OTHER COURT THAT HAS CONSIDERED THE PREEMPTION ISSUE.

By ignoring the holding in *Geier* that conflict preemption principles apply to claims that fall outside of an express preemption provision, and by upholding the imposition of tort liability on Reynolds solely for manufacturing a product that Congress permits to be manufactured, the lower court radically departed from the preemption principles adopted by every other court that has considered these issues to date.

As an initial matter, since *Geier* was decided, the federal courts of appeal and state courts of last resort have uniformly rejected the argument advanced by Kenyon's counsel and implicitly adopted by the Florida Second District Court of Appeal that an express preemption provision bars the application of conflict preemption principles. *See, e.g.*, *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 670 (9th Cir. 2003) (recognizing that just because action was not expressly preempted "nevertheless does not entirely foreclose any possibility of implied preemption") (internal quotations and citation omitted); *Fisher v. Ford Motor Co.*, 224 F.3d 570, 573 (6th Cir. 2000) (interpreting *Geier* to mean that despite the existence of an express preemption provision, "ordinary preemption principles nevertheless can apply to bar a suit against a manufacturer"); *James v. Mazda*

Motor Corp., 222 F.3d 1323, 1326 (11th Cir. 2000) (holding that regardless of existence of express preemption provision and savings clause "courts should apply normal implied preemption principles to determine if a state common law action stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotations and citation omitted); *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 794 (10th Cir. 2000) ("The presence of an express preemption provision . . . does not, by itself, foreclose an implied preemption analysis."); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 381 (7th Cir. 2000) (holding that even though "the Act's express preemption provision did not preempt the suit . . . ordinary preemption principles continue to apply to this area"); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 741 (Tex. 2001) (same).

Significantly, apart from the Florida Second District Court of Appeal, the lower courts have also uniformly held that States cannot impose tort liability on a product or practice that Congress has sanctioned. Even prior to *Geier*, the federal courts of appeal and state courts of last resort uniformly recognized that States could not impose a *de facto* ban on products, even dangerous ones, that Congress sanctions.

In the hazardous waste field, for example, federal and state courts uniformly recognize that States may regulate but cannot prohibit certain non-land-based methods of hazardous waste disposal, because Congress provided in the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6902(a)(1), that federal policy encourages such disposal. *See Hermes Consol., Inc. v. People*, 849 P.2d 1302, 1311 (Wyo. 1993) ("[A]lthough [RCRA] allows states to adopt more stringent regulations, it does not authorize them to defeat safe federal solutions . . . . [or] to directly subvert RCRA and [EPA] decisions by outright bans on activities federal authorities considered safe.") (internal quotations

omitted); *Jacksonville v. Ark. Dep't of Pollution Control & Ecology*, 824 S.W.2d 840, 842 (Ark. 1992) (holding that RCRA preempted city ordinance because the local measure frustrated RCRA's "preference for treatment rather than land disposal of hazardous waste"); *ENSCO, Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986) ("A county cannot . . . arrogate to itself the power to enact a measure that as a practical matter cannot function other than to subvert federal policies concerning the safe handling of hazardous waste."); *Rollins Envtl. Servs. of La. v. Iberville Parish Police Jury*, 371 So. 2d 1127, 1132 (La. 1979) (same).

Similarly, in the mining context, the courts have uniformly held that state laws prohibiting mining activities on public lands conflict with federal law and are preempted in light of Congress's policy of encouraging the free and open exploration of public lands for valuable mineral deposits. 30 U.S.C. § 22; *see also United States v. Coleman*, 390 U.S. 599, 602 (1968) (observing that intent of 30 U.S.C. § 22 is to reward and encourage the discovery of minerals on public lands); *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998) (local laws were preempted because they "completely frustrat[e] the accomplishment of . . . federally encouraged activities. A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages.").

Since *Geier* was decided, the federal courts of appeals have made clear that this rule applies even when States seek not to ban a product or practice outright, but to impose tort liability on the federally-sanctioned product or practice. In *Griffith v. General Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 1953 (2003), for example, the Eleventh Circuit held that automobile makers could not be liable under strict liability principles for manufacturing an allegedly dangerous pickup truck that had only a lap belt in its center seat. *Id.* at 1280-82. Citing *Geier*, the court

reasoned that the claim conflicted with federal standards expressly permitting such a lap belt design, and that "[i]f successful, [plaintiff's] suit would foreclose an option specifically permitted by [federal regulations]. Therefore, it conflicts with that federal law and is impliedly preempted." *Id.* at 1282. *See also James v. Mazda Motor Corp.*, 222 F.3d 1323 (11th Cir. 2000) (holding same with respect to claim that automobile's design was inherently dangerous because it contained manual lap belt).

Similarly, the Seventh Circuit, also relying on *Geier*, has recognized that state tort law cannot impose liability on a product that, as a matter of federal policy, must be permitted on the market. *See Hurley v. Motor Coach Indus. Inc.*, 222 F.3d 377 (7th Cir. 2000). In *Hurley*, the court of appeals concluded that a bus manufacturer could not be liable under state tort law for failing to include in a bus a knee bolster, a three-point seat belt, an airbag, and a steel cage around the driver's area. *Id.* at 380. As a matter of policy, federal regulators "with specific policy objectives in mind" had left "to bus manufacturers" decisions about how to install passenger protection systems. *Id.* at 382. Because *Geier* required the preemption of state tort law whenever it "would undermine [a] policy objective" of the Federal Government, *id.* at 382, state law could not impose liability for the design choice of a bus manufacturer that Congress had sanctioned. Thus, in the face of *Geier*, the federal circuit courts agree that state tort law is preempted when it would allow manufacturers to be held liable for creating a product or utilizing a manufacturing practice that Congress provides must be permitted in order to achieve some policy goal.

Applying these same principles, numerous lower courts have held that cigarette manufacturers cannot be subject to strict liability simply for producing and selling cigarettes. In *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220 (W.D. Wis. 2000), for example, the court dismissed the claim that "it is actionable negligence for defendants to continue to

manufacture and sell cigarettes once they realized the danger that cigarettes posed." *Id.* at 1224. Citing ***Brown & Williamson***, the court observed that "[a] holding to that effect would run afoul of the congressional policy that the sale of cigarettes is legal." *Id.* at 1223. And citing *Geier*, the court noted that "[i]f Congress gives express sanction to an activity, the [S]tates cannot declare that activity tortious." *Id.* at 1224. In addition, it rejected the argument that conflict preemption principles do not apply to tobacco claims:

> Plaintiffs are correct that there is no law or regulation that preempts their claim that it is actionable negligence for defendants to continue to manufacture and sell cigarettes once they realized the danger that cigarettes posed. What preempts their claim is Congress's considered decision that the sale of cigarettes is not only not illegal but part of a market the government supports. Just as it would have interfered with the federal government's policy on air bags to allow state tort actions against automobile manufacturers who relied on the safety standard to omit air bags from their vehicles, allowing tort actions against cigarette manufacturers and sellers for the allegedly negligent act of continuing to make and sell cigarettes would interfere with Congress's policy in favor of keeping cigarettes on the market.

Id. at 1224-25 (internal citations omitted).

Similarly, in *Cruz-Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp. 2d 109 (D.P.R. 2002), ***aff'd on other grounds***, No. 02-2688, 2003 WL 22434631 (1st Cir. Oct. 28, 2003), the court rejected the argument that cigarette manufacturers could be liable under tort law for the "inherent[ly dangerous] characteristics of tobacco and cigarettes." *Id.* at 117. Citing ***Brown & Williamson***, the court observed that "Congress has foreclosed the removal of tobacco products from the market." *Id.* at 118. And citing *Geier*, it recognized that tort actions could not "interfere with Congress's policy in favor of keeping cigarettes on the market." *Id.* (internal citations

and quotations omitted). Taken together, the court concluded, these cases compelled the conclusion that "[d]efendant Reynolds cannot be held liable under Puerto Rico law simply because it manufactures and sells cigarettes. Therefore, to the extent that Plaintiffs seek to impose tort liability against Defendant Reynolds merely for manufacturing and selling cigarettes, we find Plaintiffs' claims to be preempted." *Id.*; *see also DuJack v. Brown & Williamson Tobacco Corp.*, No. X07-00728225-S, slip op. at 4, 6-7 (Conn. Super. Ct. Nov. 13, 2001) (granting directed verdict on claim that cigarettes were defectively designed because they contain nicotine; courts cannot "impose liabilities . . . merely for engaging in [the] activity of smoking, selling and using cigarettes" because Congress has determined that these are legal activities) (attached hereto, Pet. App. 57a-62a). The Florida court's decision thus conflicts with the reasoning adopted by every federal court of appeal interpreting *Geier* and the decisions of federal and state courts considering the precise issue here.

III. THIS COURT'S IMMEDIATE REVIEW OF THE IMPORTANT QUESTION PRESENTED IS NECESSARY TO PROTECT FEDERAL POLICY AND SUPREME COURT PRECEDENT.

This Court's review is appropriate not only to correct an erroneous decision on an important federal question but to safeguard federal policy and this Court's jurisprudence.

There can be no real debate that the question presented raises issues of tremendous national importance. Congress recognizes tobacco manufacturing as "one of the greatest basic industries of the United States." 7 U.S.C. §1311(a). This Court, moreover, has observed that preemption issues concerning tobacco suits have "manifest importance." *Cippolone*, 505 U.S. at 509. Indeed, legal issues surrounding the tobacco industry are so important to the national economy and thousands of pending suits that this Court has not hesitated to review them even absent a split of authority

on the underlying legal question. *See generally Brown & Williamson*, 529 U.S. at 130 (considering tobacco regulation by FDA absent a split of authority on the issue).

Review is particularly appropriate here. Absent this Court's immediate intervention, the lower court's decision could seriously undercut federal policy by effectively causing a *de facto* ban on tobacco sales in the State of Florida. There are literally thousands of cases pending in Florida that raise the same preempted strict liability claim on which Kenyon prevailed, and of these, many are being prosecuted by the same attorneys here. A sizeable number of these cases, moreover, are pending in the circuit courts within the jurisdiction of the Florida Second District Court of Appeal.

No doubt emboldened by their victory in the lower court, Kenyon's attorneys will likely continue to argue, wrongly, that conflict preemption principles do not apply in tobacco cases. Indeed, *since this case was decided*, plaintiff's counsel has successfully argued this erroneous theory of preemption in another Florida trial against Reynolds, demonstrating that the Florida courts' erroneous view of preemption will persist absent this Court's intervention. *See Hall v. R.J. Reynolds Tobacco Co.*, No. 00-1061, slip op. at 1-2 (Fla. 13th Jud. Cir. Oct. 1, 2003). Given their potential liability for every cigarette sale in the State, cigarette manufacturers would face severe pressure to discontinue cigarette sales in Florida, raising the very threat to the national economy that Congress sought to avoid.

This Court's review is, indeed, essential in light of the lower court's attempt to shield its decision from the Florida Supreme Court and prevent a true split of authority from ever developing on the question presented. Under the Florida Constitution, the Florida Supreme Court has no jurisdiction to review *per curiam* decisions of the District Courts of Appeal when the appellate court does not issue an opinion. *See* Fla. Const. art 5, § 3(b)(3); *Jenkins v. Florida*,

385 So. 2d 1356, 1359 (Fla. 1980) ("[T]he Supreme Court of Florida lacks jurisdiction to review *per curiam* decisions of the several district courts of appeal of this [S]tate rendered without opinion."). As a result, absent intervention by this Court, the Florida courts can insulate decisions that are contrary to this Court's precedent, federal law, and the jurisprudence of every other court by refusing to issue an opinion.

That is precisely what occurred here. Even though Reynolds appealed the conflict preemption issue and demonstrated that Kenyon's claim was flatly contrary to federal policy, the Florida Second District Court of Appeal affirmed the circuit court in a one-word *per curiam* order. Pet. App. 2a. Moreover, it denied Reynolds' request for the issuance of an opinion so that the Florida Supreme Court could consider the issue. *Id.* at 1a. By doing so, the court effectively prevented the Florida Supreme Court from either correcting its error or issuing a decision that would have cleanly split with the federal courts of appeal about the meaning of *Geier* and conflict preemption. Thus, unless this Court intervenes, the Florida courts will be allowed to flout this Court's decisions and federal policy due to a procedural anomaly specific to the State. *See Florida v. Rodriguez*, 469 U.S. 1, 5 (1984) (reversing Florida District Court of Appeal after court issued one word order affirming superior court that prevented state high court review, where lower court's decision clearly misread and misapplied this Court's precedents).

The Florida court's decision is so clearly contrary to this Court's precedent that summarily disposing of this petition in Reynolds' favor would be appropriate. *See* Sup. Ct. R. 16.1. A summary reversal order is called for where "the lower court result is so clearly erroneous, particularly if there is controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Stern & Gressman, *supra*, at 315-16.

This Court has not hesitated to exercise its summary disposition power in cases involving egregious and demonstrable errors by lower courts.[3] Nor has the Court

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[3] In the past ten years, the Court has exercised its summary reversal power in over fifty cases. *See, e.g., Mitchell v. Esparza*, No. 02-1369, slip op. at 1 (Nov. 3, 2003); *Yarborough v. Gentry*, No. 02-1597, slip op. at 9-11 (Oct. 20, 2003); *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040-41; (2003); *City of Los Angeles v. David*, 123 S. Ct. 1895, 1896 (2003); *Woodford v. Visciotti*, 537 U.S. 19, 20 (2002); *Early v. Packer*, 537 U.S. 3, 4 (2002); *INS v. Ventura*, 537 U.S. 12, 14 (2002); *Stewart v. Smith*, 536 U.S. 856, 861 (2002); *United States v. Bass*, 536 U.S. 862, 864 (2002); *Kirk v. Louisiana*, 536 U.S. 635, 635-36 (2002); *Horn v. Banks*, 536 U.S. 266, 267 (2002); *Sao Paulo State of Federative Rep. of Braz. v. Am. Tobacco Co., Inc.*, 535 U.S. 229, 232-33 (2002); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505 (2001); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001); *Ohio v. Reiner*, 532 U.S. 17, 18 (2001); *Fiore v. White*, 531 U.S. 225, 228-29 (2001); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222-24 (2000); *Texas v. Lesage*, 528 U.S. 18, 22 (1999); *Flippo v. West Virginia*, 528 U.S. 11, 12 (1999); *Maryland v. Dyson*, 527 U.S. 465, 465 (1999); *Cent. State Univ. v. Am. Ass'n of Univ. Professors, Cent. State Univ. Chapter*, 526 U.S. 124, 127-29 (1999); *Stewart v. LaGrand*, 526 U.S. 115, 118-21 (1999); *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 250 (1999); *Calderon v. Coleman*, 525 U.S. 141, 145-47 (1998); *New Mexico, ex rel. Ortiz v. Reed*, 524 U.S. 151, 153-55 (1998); *Hetzel v. Prince William County, Virginia*, 523 U.S. 208, 211-12 (1998); *City of Monroe v. United States*, 522 U.S. 34, 35 (1997); *Pounders v. Watson*, 521 U.S. 982, 983 (1997); *Mazurek v. Armstrong*, 520 U.S. 968, 971-76 (1997); *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997); *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-56 (1997); *United States v. Watts*, 519 U.S. 148, 149 (1997); *Greene v. Georgia*, 519 U.S. 145, 145-47 (1996); *United States v. Jose*, 519 U.S. 54, 57-58 (1996); *Pennsylvania v. Labron*, 518 U.S. 938, 938 (1996); *Calderon v. Moore*, 518 U.S. 149, 150-51 (1996); *Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 475-76 (1996); *Wood v. Bartholomew*, 516 U.S. 1, 2 (1995); *Purkett v. Elem*, 514 U.S. 765, 769 (1995); *United States v. Robertson*, 514 U.S. 669, 671-72 (1995); *Goeke v. Branch*, 514 U.S. 115, 120-21 (1995); *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *Stansbury v. California*, 511 U.S. 318, 325-27 (1994); *Burden v. Zant*, 510 U.S. 132, 133-34 (1994); *El Vocero de Puerto Rico (Caribbean Int'l News Corp.) v. Puerto Rico*, 508 U.S. 147,

ever limited its exercise of summary disposition power to criminal cases, summarily disposing of cases where the underlying suit involves legal principles that affect civil, rather than criminal, liability. *See Alafabco*, 123 S. Ct. at 2040-41 (arbitration dispute); *Major League Baseball Players Ass'n*, 532 U.S. at 505 (arbitration); *Breeden*, 532 U.S. at 271 (employment discrimination); *Village of Willowbrook v. Olecho*, 528 U.S. 562, 565 (2000) (easement dispute); *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. at 127-28 (statutory interpretation).

In addition, summary disposition is not a device limited to reversing the federal courts of appeals, but is routinely applied by this Court to state court decisions where, as here, the state court disregarded Supreme Court precedent. *See Alafabco*, 123 S. Ct. at 2040-41 (summarily reversing decision of Alabama Supreme Court that misapplied Supreme Court jurisprudence interpreting the Federal Arbitration Act); *Bunkley v. Florida*, 123 S. Ct. 2020, 2023-24 (2003) (summarily vacating Florida Supreme Court decision as inconsistent with *Fiore v. White*, 531 U.S. 225 (2001)); *Kaupp v. Texas*, 123 S. Ct. 1843, 1847-48 (2003) (summarily vacating Texas intermediate court decision as contrary to Court's Fourth Amendment jurisprudence); *Kirk*, 536 U.S. at 636 (summarily reversing Louisiana intermediate court decision as inconsistent with *Payton v. New York*, 445 U.S. 573 (1980)).

149-51 (1993); *United States v. Padilla*, 508 U.S. 77, 81-82 (1993); *Delo v. Lashley*, 507 U.S. 272, 277-80 (1993); *United States v. Nachtigal*, 507 U.S. 1, 5-6 (1993); *Dobbs v. Zant*, 506 U.S. 357, 358-60 (1993).

Indeed, just days before this petition was filed, the Court summarily reversed a decision of the Sixth Circuit—the second summary reversal of the Term. *See Esparza*, No. 02-1369, slip op. at 1.

This is true even when the lower court is a state *intermediate* court that has failed to apply Supreme Court precedent. *See Kaupp*, 123 S. Ct. at 1847-48 (vacating decision of intermediate Texas court); *Kirk*, 536 U.S. at 636 (reversing decision of Louisiana intermediate court); *Dyson*, 527 U.S. at 466 (summarily reversing intermediate Maryland court); *Newsweek, Inc. v. Fla. Dep't Revenue*, 522 U.S. 442, 443-44 (1998) (summarily vacating decision of the Florida District Court of Appeal); *Rodriguez*, 469 U.S. at 5 (summarily reversing one-word order of Florida District Court of Appeal).

In light of the thousands of pending cases in Florida raising the issue here, the clear error of the Florida Second District Court of Appeal and the need to protect federal policy, this Court's review, as well as its summary disposition of this case, is essential.

CONCLUSION

The petition should be granted, and either the Florida Second District Court of Appeal's decision should be summarily reversed or the Court should hear argument on the question presented.

Respectfully submitted,

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November 2003

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

AUGUST 8, 2003

CASE NO.: 2D02-1667
L.T. No.: 00-5401 DIV.D

R.J. Reynolds Tobacco Company,	v.	Florence Kenyon, As Personal Representative
Appellant/Petitioner(s)		Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing, rehearing en banc, certification and issuance of written opinion is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

/s/
James Birkhold
Clerk

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

R.J. REYNOLDS TOBACCO COMPANY, Appellant, v. FLORENCE KENYON, as Personal Representative of the Estate of Floyd J. Kenyon, Sr., Appellee.	)	Case No. 2D02-1667

Opinion filed May 30, 2003.

Appeal from the Circuit Court for Hillsborough County; Herbert J. Baumann, Jr., Judge.

PER CURIAM.

Affirmed.

SALCINES, DAVIS, and COVINGTON, JJ., Concur.

IN THE CIRCUIT COURT FOR THE 13th JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
GENERAL CIVIL DIVISION

FLOYD J. KENYON, SR. and
FLORENCE KENYON, his wife,

Plaintiffs,

Case No. 00-05401
Div. D

v.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE having been tried to a jury and on December 12, 2001, a verdict having been rendered finding in favor of Plaintiff, Floyd J. Kenyon, and against Defendant, R.J. Reynolds Tobacco Company, and finding that Plaintiff, Florence Kenyon, is not entitled to damages,

IT IS HEREBY ORDERED AND ADJUDGED that final judgment for compensatory damages is hereby entered in favor of Plaintiff, Floyd J. Kenyon, Social Security No. 110-20-0431, most recently located at 2238 Sonoma Drive West, Nokomis, Florida 34275, against Defendant R.J. Reynolds Tobacco Company, headquartered at 401 N. Main St., Winston Salem, North Carolina 27102, in the sum of $165,000.00 (One Hundred and Sixty-Five Thousand Dollars and No Cents). Said sum shall bear interest at the rate of eleven percent (11%) per annum from the date thereof, all for which let execution issue.

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff, Florence Kenyon, Social Security No. 099-24-3410, most recently located at 2238 Sonoma Drive West, Nokomis, Florida 34275, take nothing by this action.

IT IS FURTHER ORDERED AND ADJUDGED that jurisdiction over this cause be, and the same is, hereby reserved to determine the amount, if any, of attorneys' fees and costs, including those incurred in any post-judgment proceedings.

DONE AND ORDERED this ___ day of December, 2001, in Tampa, Hillsborough County, Florida.

/s/
Herbert J. Baumann, Jr.
Circuit Court Judge

Signed 12/18/01

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

FLOYD J. KENYON, SR. and FLORENCE KENYON, his wife,	)	
Plaintiffs,	)	Case No. 00-5401
	)	DIVISION D
v.	)	
R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,	)	
Defendant.	)	

VERDICT FORM

The Court has instructed the jury on the law. Based on those instructions and the evidence in this case, please answer the following questions:

1.A. Was there negligence on the part of Defendant R.J. Reynolds Tobacco Company, for not providing adequate health warnings to Plaintiff Floyd Kenyon prior to July 1, 1969, which was a legal cause of damage to Plaintiffs Floyd Kenyon and Florence Kenyon?

Yes _____ No ___√___

1.B. Was there negligence on the part of Defendant R.J. Reynolds Tobacco Company for failing to exercise reasonable care in the design of its products, which was a legal cause of damage to Plaintiffs Floyd Kenyon and Florence Kenyon?

Yes _____ No ___√___

Please proceed to Question 2.A.

2.A. Were the Camel and/or Salem cigarettes manufactured by Defendant R.J. Reynolds Tobacco Company defective for not providing adequate health warnings to Plaintiff Floyd Kenyon prior to July 1, 1969, which was a legal cause of damage to Plaintiffs Floyd Kenyon and Florence Kenyon?

Yes _____ No ___√___

2.B. Were the Camel and/or Salem cigarettes manufactured by Defendant R.J. Reynolds Tobacco Company defectively designed, which was a legal cause of damage to Plaintiffs Floyd Kenyon and Florence Kenyon?

Yes ___√___ No _____

Please proceed to the next page.

If your answers to all of the above are "No," your verdict is for Defendant R.J. Reynolds Tobacco Company and you should proceed no further except to sign and date your verdict and return it to the courtroom.

If you answered "Yes" to any of the above questions please answer all the remaining questions on this Verdict Form.

3. What is the amount of any damages sustained by Plaintiff Floyd Kenyon for medical expenses in the past and medical expenses to be sustained in future years?

$ $165,000.00

4. What is the amount of any damages sustained by Plaintiff Floyd Kenyon for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect or loss of capacity for the enjoyment of life in the past and to be sustained in the future (not including damages in number 3)?

Floyd Kenyon $ 0

5. What is the amount of any loss by Plaintiff Florence Kenyon of the services, comfort, society and attention of Plaintiff Floyd Kenyon in the past and in the future, by reason of her husband's injury?

Florence Kenyon $ 0

6. Under the circumstances in this case, state whether punitive damages are warranted against Defendant R.J. Reynolds Tobacco Company?

Yes _____ No √

SO SAY WE ALL THIS 12 day of December, 2001.

/s/
Foreperson

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

FLOYD J. KENYON, SR. and FLORENCE KENYON, his wife,	:	
Plaintiffs,	:	CASE NO. 00-5401 DIVISION D
v.	:	
R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,	:	
Defendant.	:	

ORDER ON DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON PREEMPTION

THIS MATTER having come before the Court on October 9, 2001, upon Defendant R.J. Reynolds Tobacco Company's Motion for Partial Summary Judgment Based on Preemption, and the Court having heard argument of counsel, and being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant's motion for partial summary judgment is granted as to Plaintiffs' post-1969 negligence and strict liability claims for failure to warn, Plaintiffs' post-1969 neutralization claims, as well as Plaintiffs' post-1969 conspiracy to commit fraud through concealment claims because they allege a duty to warn beyond that imposed by the Federal Cigarette Labeling and Advertising Act.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida on this ___ day of October, 2001.

/s/
Herbert J. Baumann
Circuit Court Judge

October 25, 2001

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION NO. 00-5401, DIVISION D

FLOYD J. KENYON, SR. and
FLORENCE KENYON, his wife,

Plaintiffs,

v.

R.J. REYNOLDS TOBACCO
COMPANY, a foreign corporation,

Defendant.

JURY INSTRUCTIONS

Members of the jury, I shall now instruct you on the law you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only these issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I instruct you, to the facts as you find them from the evidence.

* * *

STRICT LIABILITY CLAIM

The issues for your determination on the strict liability claim of Plaintiffs Floyd Kenyon and Florence Kenyon against Defendant R.J. Reynolds Tobacco Company are:

A. Were the Camel and/or Salem cigarettes manufactured by Defendant R.J. Reynolds Tobacco Company defective for not providing adequate health warnings to Plaintiff Floyd Kenyon prior to July 1,

1969, which was a legal cause of damage to Plaintiffs Floyd Kenyon and Florence Kenyon?; and

B. Were the Camel and/or Salem cigarettes manufactured by Defendant R.J. Reynolds Tobacco Company defectively designed, which was a legal cause of injury to Plaintiffs Floyd Kenyon and Florence Kenyon?

A product is defective if, by reason of its design, the product is in a condition unreasonably dangerous to the user, and the product is expected to and does reach the user without substantial change affecting that condition. As to determining an unreasonably dangerous design, a product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer. The product must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer at the time, with the ordinary knowledge common to the community as to its characteristics.

A product may also be unreasonably dangerous if the risk of danger in the design outweighs the benefits.

In determining whether the risk of danger outweighs the benefits, you must consider the following factors: (1) the usefulness and desirability of the product; (2) the availability of other and safer products to meet the same need; (3) the likelihood of injury and its probable seriousness; (4) the obviousness of the danger; (5) common knowledge and normal public expectation of danger (particularly for established products); (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings); and, (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

As such, in this case, in determining whether the risk of danger in the design outweighs the benefits of Camel (unfiltered) or Salem (filtered) cigarettes, you must consider: (1) whether the alleged injuries Plaintiff Floyd Kenyon sustained as a result of the challenged design for Camel (unfiltered) or Salem (filtered) cigarettes would have been avoided, or less severe, had Defendant R.J. Reynolds Tobacco Company used a feasible and available alternative design; (2) whether the enhanced danger posed by the challenged design outweighed the added cost, if any, to Defendant R.J. Reynolds Tobacco Company; (3) whether Plaintiff Floyd Kenyon would have used the product employing the alternative design instead of the products that he did smoke; and (4) whether Plaintiff Floyd Kenyon's injuries would have been avoided if he had used the product with this alternative design.

* * *

A defect in a product is a legal cause of injury if it directly and in natural and continuous sequence produces or contributes substantially to producing such injury so that it can reasonably be said that, but for the defect, the injury would not have occurred. In order to be regarded as a legal cause of loss, injury, or damage, the defective design need not be the only cause. A defect may be a legal cause of loss, injury, or damage even though it operates in combination with the act of another or some other cause if such other cause occurs at the same time the defect had its effect and if the defect contributes substantially to producing such loss, injury, or damage.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendant.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	22 February 2002
TIME:	Commencing at 2:25 p.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

MS. PARKER: Let me pull up the verdict form and just very briefly remind the Court what happened and where we are.

We had the trial. The jury deliberated for two days, and they got it right on everything except one question. They came back with a defense verdict on negligence failure to warn, negligence design defect, strict liability failure to warn. They found no punitive damages. They found no loss of consortium. They got hung up on this one question, 2(b), and that is the strict liability design defect issue, and that's what I want to spend my time on today.

* * *

So, that leads to pre-emption. I won't spend a lot of time on this, because I know Your Honor has heard argument on it before; but briefly, it all started with the United States Supreme Court back in 2000 under the [Geier] case. That's where there was a products liability case against the manufacturer of a car, against Honda; and the plaintiff said, "Well, you should have had an air bag," and Honda came back and said, "Well, the law says you can either have a shoulder belt, a lap belt, or an air bag, one of the three."

And this was—but there was a state tort law that said, "No. You can recover—the plaintiff can recover for lack of an air bag."

And the United States Supreme Court said, "No. If there's a federal law that addresses the issue, a state cannot come forward and have tort liability that's in violation of the federal law," and that was again in the context of a car case.

That same year, in FDA vs. Brown & Williamson, where the Supreme Court of the United States said that Congress has addressed this issue—this exact issue that we heard in the trial here on six occasions since 1965 and that Congress

was well aware of the adverse health consequences, as well as pharmacological effects of nicotine; but, nevertheless, Congress has said—the Supreme Court acknowledged cigarettes are a lawful product despite those problems unless there's a design issue.

And that leads us back to the first point that we made. The Insolia case is the only case—we've looked every which way, and Insolia is the only case that's addressed that since FDA v. Brown & Williamson. I believe the issue there's a pipeline, but it has not been cited by other appellate courts.

But Insolia said one thing: Congress gives express authority to the state, and you can't—so, it's error not to give our proposed jury charge on this issue.

And we asked for that jury charge again, and it comes straight back to Question 2(b). Congress and the United State Supreme Court said the only proper basis for liability is if there is some alternate design that would have prevented the injury. You can't have liability just because smoking cigarettes may cause lung cancer. You can't have liability just because smoking cigarettes may have pharmacological effects. That's not enough under the Supreme Court case law.

And [the] only thing that Mr. Acosta has said every time we've argued this is, "Well"—and actually, I think it's Mr. Maxwell who argued this—" Well, Carter came out. The United States Supreme Court denied cert. in Carter and FDA vs. Brown & Williamson. So, that means this whole conflict pre-emption doesn't mean a thing in Florida."

Your Honor, I have the cert. petition. I'll be glad to file it if Your Honor wants me to. Carter did not raise this issue. It was not raised, because the Supreme Court case hadn't come out at the time. So, the fact that the Florida State Supreme Court denied cert. in Carter, that is before this decision came out in FDA vs. Brown & Williamson. It wasn't raised.

And here's what Your Honor said at trial: Your Honor said, "I appreciate argument. I appreciate it down the road, but I won't give that instruction," and that's where we are. It all comes back to that Question 2(b) on the verdict form.

* * *

THE COURT: I—I'll—I do have some questions. I want to give Mr. Acosta an opportunity to respond. I can ask some—

MS. PARKER: Thank you.

THE COURT: And I can ask some questions.

Do I have—I do think some of these issues are interesting. I think ultimately the Second DCA is going to wind up addressing them on somebody's behalf, some of these issues.

* * *

MR. ACOSTA: Now, the conflict pre-emption point that she raised, first of all, none of the cases that she cited overruled Cippolone, a U.S. Supreme Court case. I have a copy of Cippolone, if you'd like.

But Cippolone is still the law. It's still the law. The Florida Supreme Court in Carter read Cippolone, and the law of Florida today is that we can go forward the way that we have and the way that we did. And until the U.S. Supreme Court overrules Cippolone, that's the law; and only claims for failure to warn that are—or claims that would suggest that the warnings after 1970 were inadequate are precluded.

And Carter specifically held that there was—there was lots of other evidence post-'70 that was admissible and relevant regarding other kinds of statements that were made in terms of their research practices and in terms of their testing that they did or didn't do. Those things were relevant and permitted under Cippolone, according to the Florida Supreme Court and according to Cippolone itself.

Essentially, what Reynolds is now arguing is that they should have some sort of sovereign immunity because Congress said you could sell a cigarette; but there's a lot more to it than just the fact it might have been legal to sell them. They did other things that were tortious, and that's what we had to prove. We didn't prove our case simply on the basis that they were liable because they sold cigarettes. We had a lot of other elements to prove, and we proved it.

* * *

THE COURT: Let me—I am satisfied that the jury instructions that were given were appropriate. So, from the standpoint there's an issue raised with regard to jury instructions, that's—

MS. PARKER: I'll answer any questions Your Honor has. Otherwise, I would like to respond on the other point.

THE COURT: But let me—you can respond, but let's—let me focus in a little bit. Undoubtedly the pre-emption issue is an appropriate appellate issue—appropriate issue for any court, but it's appropriate to be addressed at some point in time.

But it does seem to me that there continues to be, assuming—one assumes the finding by this jury is correct. You raised a lot of issues. It seems to me that still the design issue is an open issue notwithstanding the recent Supreme Court cases.

MS. PARKER: Your Honor, I totally agree; and there has been—I feel like I'm arguing apples and oranges here. I totally agree. Cippolone is still good law. I totally agree that in the state of Florida you can have a cause of action for strict liability design defect, but only if there is a feasible, safer alternative design.

THE COURT: Right.

MS. PARKER: That's the problem.

THE COURT: And that's a separate issue.

MS. PARKER: No, Your Honor. That is the conflict pre-emption issue. Conflict pre-emption says you cannot have state tort liability for something that the federal government has declared lawful. What the federal government has declared lawful is selling cigarettes that may cause—may have health consequences and may have pharmacological effects.

What that whole FDA vs. Brown & Williamson—that case—what that leaves open, what it says is still good law, is Cippolone; is having a cause of action in state law for design defect if the plaintiff can prove there's a feasible, safe alternative design. And that gets us back to Question 2(b). That's what we don't have here.

So, I'm not arguing that Cippolone should be thrown out. I'm saying simply conflict pre-emption means you cannot have liability unless that is the basis, unless the basis is a feasible, safer alternative design.

And Mr. Acosta has still not said what that evidence is. You know, if this goes up on appeal right now, there's still not one articulation by Mr. Acosta.

He said, "Oh, well there's plenty of evidence. Plenty of evidence."

What is it? Today is the day. What is it? And there isn't any. I mean, there's no way around that. There's just no way around that.

The—I do want to say this about the jury charges, and I won't belabor it. There are two issues; and one issue—with respect to the jury charges on this Question 2(b), one issue is the jury charge on the test, risk utility or strict liability—I'm sorry, risk utility or consumer expectations. Okay? That's one jury charge issue.

The other jury-charge issue is feasible, safer alternative design, and that's what we asked for and we believe is a correct statement.

If you could pull up Taylor and all that.

That is the law in Florida.

THE COURT: Well, they disagree with you.

MS. PARKER: Your Honor has already charged the jury on that.

THE COURT: I charged the jury on that. I was comfortable with the charge. I understand.

MS. PARKER: We're past that point. So, if that's the law as Your Honor has charged the jury, the plaintiff has to show he would have used it and it would have avoided his injury. And there is not a shred of evidence. There is no inference. There is nothing on that topic. Nothing.

I want to address—I won't go into the—except to let me say this one thing: I won't go into the issue of whether we asked for the jury charge or not.

THE COURT: That's going to be on the record, you know, and it doesn't matter.

MS. PARKER: It is.

THE COURT: It doesn't matter for purposes of what I'm doing today, because as I again—you know, there was an extensive—we spent several hours regarding jury instructions, and there's going to be a variety of argument on the instructions; and frankly, as I recall, nobody was—no one was particularly happy with all parts of the jury instruction. I mean, you had issues; the plaintiffs had issues. I'm still comfortable with the jury instructions. And if somebody looks at it one day, they can express their satisfaction or dissatisfaction.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendants.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	10th December 2001
TIME:	Commencing at 9:06 a.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

MR. ACOSTA: Now, this is an important instruction: "A product is defective if it is unreasonably dangerous when placed in the hands of the consumer without a warning." That's the law you are to follow, and I want you to think—let me rephrase that.

You should think of two things that Dr. Townsend said: One, a cigarette is inherently dangerous; and, two, it's not safe for its intended use. A cigarette is not safe for its intended use.

If it's inherently dangerous and not fit for its intended use, it's unreasonably dangerous and defective. That's why this word "defective" people—the definition is a little challenging. This is the definition of "defect." It doesn't mean that the cigarette has a rock in it that shouldn't be there. That's—if it—if it is unreasonably dangerous and doesn't have a warning, it's defective.

We know it didn't have a warning. Dr. Townsend said there's no such thing as a safe cigarette. He said it was inherently dangerous, and he said it's not fit for its intended use. So, there you go. This weighs in favor of the plaintiff.

* * *

MR. ACOSTA: And let's got [sic] to strict liability real quick. The first prong of strict liability—there's two issues here. It was whether it was defective for not providing health warnings. It's similar to the other one, but there's a different test that you use rather than the negligence test—and by the way, you're going to get a copy of these, I think, to take back in the jury room with you so you can read these over again.

And there's two parts to this one just like in the negligence claim. The second one is whether it was defectively designed.

And then you'll be determining—there is a two-part test, because it can be defective under this kind of liability for two different reasons. Does the product meet the consumer expectations for the product? If consumers thought it was safe and it wasn't, then it didn't meet their expectations. So, it would be defective under—under this definition.

And this is how you would read it, "As to determining an unreasonably dangerous design, a product is unreasonably dangerous because of its design if the product fails to perform as an ordinary consumer would expect when used as intended."

Well, that sort of means that today you could look at it and say, "Well, it performs as intended today because everybody knows that it's dangerous." Back then it didn't. So, back then the same cigarette could be defective 30 years ago, but not today.

We're asking you to find that cigarettes that Mr. Kenyon smoked in the '40s, '50s, '60s, and '70s were defective in the way they were designed, because they don't meet this test.

The other test that's used is a lot more complicated, even though it looks simple when you first read it. "A product may also be unreasonably dangerous if the risk of danger outweighs the benefit."

Well, so, you have to say, "What's the benefit of a cigarette?" Most people tell you people don't smoke—don't ever tell you. What's the benefit of that? There isn't any.

So the risk of danger would outweigh—it would simply outweigh whatever benefit you get from the cigarette. But then you have to consider a bunch of factors. And although you must consider them, it doesn't mean that any of them are particularly binding. You just have to consider them in determining whether or not the risk of danger in the design outweighs the benefit. We believe that the risk of danger does under either test.

* * *

MR. ACOSTA: The whole idea there was that it was nicotine that they sold. It was nicotine that made people smoke. And he thought up alternative products in the late '60s, knowing that they could never make a healthy cigarette.

Knew it back then, but they didn't do anything about it because they wanted to stay in the conventional cigarette business as long as they could.

They don't even start on the Premier until 1982. And then that goes bust. Now it's ten years or 12 years since then, and there's no Eclipse on the market that you can buy down at the 711. It's not there.

These are drug delivery devices. You may remember the patent, the patent application information. They're drug delivery devices, that's what they are.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendant.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	7 December 2001
TIME:	Commencing at 1:20 p.m.
REPORTED BY:	Mary Elizabeth Baker, RPR Notary Public, State of Florida

* * *

MS. PARKER: All right. I have one just kind of big picture objection that I just need to cite for the record again and that is conflict pre-emption, which I've already mentioned earlier.

THE COURT: Right.

MS. PARKER: We think that should be a proper test and I just want to state that again for the record. I understand Your Honor's prior ruling.

THE COURT: I've ruled, Okay.

* * *

THE COURT: So 3 would read: "Whether plaintiff, Floyd Kenyon, would have used—used the product employing the alternate design instead of the products that he did smoke."

MR. ACOSTA: Judge, I still—I don't understand why the plaintiff would even have to use—let's pretend that—it's a drug. And you take Phen-Fen or something. And you find out later that Phen-Fen causes heart murmurs and heart valve problems. What if the plaintiff just wouldn't have used it at all if he knew it was defective. Certainly that is his option, but to require him to have to use some other product instead is—I think putting a—a completely and totally unfair burden on the plaintiff.

THE COURT: Well, but as I see it, the issue on alternative design is, I mean, what you're trying to establish liability for is the failure of the defendant to make available other design options that you contend could have been available for—

MR. ACOSTA: We don't have any claim at all for that. We did not claim—

THE COURT: You're claiming your client was injured.

MR. ACOSTA: We're claiming the client was injured by a defective product. We don't have a claim that they should have made some alternative design product. That's—what—they—they claim that as a defense that they couldn't make an alternative design, and then now they're trying—

THE COURT: No, I understand there's going to be factual issues that are going to be addressed in closing on—on design, but you're going to suggest, if I'm not mistaken, that they could have—they could have brought to market additional, different designs, correct?

MR. ACOSTA: What we contend is that they should have cured the defect in the products that he smoked. And—

THE COURT: I understand.

MR. ACOSTA: —and that they shouldn't have been available to him in the form that they were in. Period. That's what the plaintiff contends, that they were defective and reasonably dangerous in that sense. Now they claim, well, you know, we couldn't have made them any other way or something like that. That's their defense.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendants.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	7 December 2001
TIME:	Commencing at 9:00 a.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

THE COURT: Any others on negligence?

MS. PARKER: Can we have just a moment to go through 'em?

THE COURT: Sure.

(Pause.)

MS. PARKER: Number 17—Defendant's Number 17, "Cigarettes are a legal product."

THE COURT: Yeah, I—I will not give that. I think it's—I think the instruction, I think, as it stands sufficiently addresses that issue.

MS. PARKER: Your Honor, this really goes to—I feel like I need to—

THE COURT: The case law, I understand. You can articulate that.

MS. PARKER: On a separate issue, I feel like I need to go ahead and mention this here, as well as the strict liability conflict pre-emption issue. I know Your Honor's heard us argue that before, but we have a requested charge on conflict pre-emption, and that should be the overarching standard under a recent Florida Supreme Court case that came out after Carter came out. So, I want to make sure Your Honor understands that is a request that we have.

THE COURT: And I appreciate the legal arguments you raised in that regard. I think that the way the instruction is currently crafted, articulating the standards under state law by its very nature recognizes the fact that products manufactured were manufactured legally by your claim [sic]; and I see no other way to address that issue other than to give the instructions as they're written.

So, I appreciate the argument. I appreciate it down the road, but I won't give that instruction. I'll leave the instruction as it is.

MR. MAXWELL: Your Honor, just for the record, on this same point, you know, one of the cases cited in support of this is the Lorillard Tobacco Company v. Reilly case, which came down last spring or early this summer. The U.S. Supreme Court case, following Reilly within several weeks, denied review of the Carter case.

So, we think that the Carter instructions and the opinion from the Florida Supreme Court is not in any way inconsistent with Reilly or any of these cases.

THE COURT: And let the record reflect this Court finds the Florida Supreme Court very persuasive.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendants.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	28 November 2001
TIME:	Commencing at 2:40 p.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

MS. PARKER: One other thing, I know Your Honor has heard this, and I'm not going to address it in much detail, but the conflict pre-emption issue, you know, the United States Supreme Court has said that Congress has addressed this issue six times. And all six times that Congress addressed it, it says—Congress will enact these statutes—adverse health consequences of tobacco use were well known as were nicotine's pharmacological effects. All that we're hearing in the case, all Mr. Acosta's arguing, all of this that we're hearing this morning, it all goes to the nicotine in the cigarettes. Does nicotine have a pharmacological effect? Is nicotine addictive? And the Congress and the United States Supreme Court have said, "so what. That's not enough. They're legal even if they have health risks and even if they contain nicotine that has pharmacological effects."

The Supreme Court has said that's okay. So, there's got to be something else here, and we haven't heard it.

THE COURT: Well, I—I understand—I appreciate the argument of both counsel. Ultimately, I don't think in—clearly from what I recall, Mr. Kenyon did not testify that he was going to seek out an alternate type of product. Nonetheless, the fact that he switched products, I think is sufficient to overcome the motion for directed verdict. I want to make—I mean, you know, so you both can argue this again which undoubtedly will happen.

As I have read this over the last couple of days, I think ultimately where I come down on this issue is the mere fact he went from Camel to Salem is sufficient evidence to put the—to move this matter toward the jury on that issue.

MS. PARKER: I appreciate Your Honor letting me argue that. Thank you.

THE COURT: And I have also looked at your argument with regard to legal product. But I'm not sure how that—

how I'm—I'm not sure if I'm—I've yet to—I've yet to be convinced either way I ought to tamper with this Carter jury instruction. So, it—and—and it's—there's no question it's broader than the standard jury instruction, but by the same token, it—it does—it does address—I mean, and I don't—agree or disagree with it. We'll take record objections at the appropriate time, but it does address, I think the issues that this jury needs to consider in this case with regard to—if we're going to get to the end of case.

So, at this point, just so both sides know, if there is going to be specific requests on—to modify the Carter instruction, put it in writing and make it. But it's—who wants to start typing this up as it is?

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY
CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendants.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	28 November 2001
TIME:	Commencing at 9:00 a.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Notary Public, State of Florida

* * *

BY MR. ACOSTA:

Q. Well, I'm asking you, isn't it true that Reynolds cannot demonstrate that the cigarette is safe for its intended use?

BY MR. TOWNSEND:

A. I think I just answered that question.

Q. Is it true, what I just said?

A. What I said—

Q. Well, you can—it's either true or it's not, and then you can explain it if you would like to. But I would just like to know if what I just said was true, that Reynolds cannot demonstrate that the cigarette is safe for its intended use?

A. In a general sense, that is a true statement.

Q. And one of the reasons you can't do that is because, as I believe you testified, that the cigarette is inherently dangerous?

A. That's exactly what I testified. There are inherent strong risks from any cigarette. No cigarette is safe. And further more there is no way if we develop a cigarette that completely eliminates the risks, for example, some modification of Premier or Eclipse, there is no way to definitively prove, given the science and lack of consensus about what test is appropriate in the scientific community. There's no way to prove that that cigarette would be completely safe. There is no safe cigarette.

* * *

BY MR. ACOSTA:

Q. Does Reynolds make a pack of 20 pieces of gum that it sells for a couple of bucks?

BY MR. TOWNSEND:

A. Of course not. I don't understand the point of the question.

Q. How much does a pack of nicotine gum cost?

A. I don't know.

Q. 25, 30, $40?

A. I have no idea.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendants.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	27 November 2001
TIME:	Commencing at 9:10 a.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

BY MR. ACOSTA:

Q. And the Reynolds sales of cigarettes are several billion dollars a year, aren't they?

BY MR. TOWNSEND:

A. Yes.

Q. And so, over the last 40 or 50 years, the percentage spent on research and development is about one percent of Reynolds' sales; is that true?

A. I think that would be probably a reasonable guess plus—you know, it's within a few hundred million dollars.

Q. And the products that Reynolds designs and manufactures are the choice of Reynolds, aren't they?

A. I don't understand your question. What do you mean "choice"?

Q. Well, doesn't Reynolds choose to make the products it does?

A. We choose to make a number of products that we then put on the market. Ultimately, it's the consumer that makes the choice about whether they stay on the market.

* * *

BY MR. ACOSTA:

Q. You said cigarettes are risky; right?

BY MR. TOWNSEND:

A. Many times.

Q. In fact, I believe you testified there's no such thing as a safe cigarette?

A. I didn't say that yesterday. I have said that many times, and not just in court.

Q. And—so, Reynolds' position is, in fact, that there is no safe cigarette?

A. Absolutely. There is no safe cigarette. What we've tried to do at Reynolds, however, is reduce the risk. But we'll be the first to tell you there is no safe cigarette—completely safe.

Q. And—

MS. PARKER: Your Honor, may I have a cite?

THE COURT: You may.

BY MR. ACOSTA:

Q. Dr. Townsend, before I show this, can you tell me, when was it that Reynolds first concluded there was no safe cigarette?

A. I don't—

MS. PARKER: (Stands)

THE COURT: Before you do that, I'll allow the question. Let Ms. Parker have the cite.

MR. ACOSTA: I'm sorry. That went off by accident. Excuse me, Your Honor.

THE COURT: All right.

BY MR. ACOSTA:

Q. Dr. Townsend, when was it that Reynolds first concluded that there was no safe cigarette?

BY MR. TOWNSEND:

A. I don't know that there's a definite period where Reynolds said, "Oh, okay, now we understand that there is

no safe cigarette." Because if you go back in the history of Reynolds, it's clear in the records that scientists and management at Reynolds understood that cigarettes represent a major risk, particularly for lung cancer, but also for other diseases; and that stems out of the epidemiology that really came together in the very early '50s. There has been no debate that cigarette smoking is a risk for those diseases.

Q. So, your testimony is you don't know when Reynolds concluded that there is no safe cigarette? Is that fair to say?

A. That's essentially what I said. Understanding that I think, at least in my review of the history of Reynolds we understood the risks based on the epidemiology. We understood that cigarettes pose risks, and so, if you're asking me to define a particular time where we said, "There is no safe cigarette," you know, I'm not sure I can do that. Because the corollary to that understanding is that there is no safe cigarette.

Q. But it's safe to say today that Reynolds' position is there is no safe cigarette?

A. Absolutely.

Q. Never has been, has it?

A. Never has been—

Q. A safe cigarette?

A. I think that's fair to say. Cigarettes pose risks and our job has been to reduce those risks, and we've been successful.

Q. Okay. Let me show you a table of—when you discuss risks, you have to discuss it in terms of how risky it is, don't you?

A. I think it's important to know the relative risks, if you will, which is at least one measure. Now, I'm not an

epidemiologist either. You may be talking to the wrong witness. But I think it's important to know what the relative risk is or how risky it's—how risky smoking is compared to other risks for certain diseases.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendant.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	22 October 2001
TIME:	Commencing at 9:06 a.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Notary Public, State of Florida

* * *

THE COURT: Well, I—that I'm not surprised about. What do—here's the question, though: What are you going to propose the jury instruction that goes back to the jurors on your negligence and strict liability? Because I think the defendant's position is, if I'm correct, that there's a bar that—that evidentiary if—by greater weight of the evidence, you're going to meet your negligence standard, and their contention is that because it's a product that's available to be sold, notwithstanding no—apparently no known risk or—I think you've got a certain evidentiary standard. Whatever do you think your evidentiary standard is?

Can [sic] you don't have to answer that now. You can think about it—I need you to come back here or are you just planning on using the standard instructions?

MR. ACOSTA: Yes, Your Honor. And the instruction that was approved by the Florida Supreme Court in Carter.

THE COURT: Well, the Carter instructions, I understand, but that doesn't go to this—my recollection of the Carter instruction was it didn't go to the issue—this particular issue.

MR. ACOSTA: Of conflict—what they claim is immunity. And then, in essence, they're asking you to direct a verdict on—

THE COURT: Well, no, they're asking me to direct a verdict, and I, obviously by—by trying—my opinion it's not a directed verdict issue. It could be if there's insufficient evidence, but it's a directed verdict issue than [sic] issue of what the standard of proof, which—

MR. ACOSTA: I guess I don't see it as a standard of proof issue at all. What I understood their jury instruction to say is that the Court now instructs you, the jury, that you cannot find the defendant negligent or strictly liable—I was just handed a copy—let's see, Mr. and Mrs. Kenyon were

required to prove by the greater weight of the evidence that there were feasible and demonstrably safe alternative design—I guess I jumped ahead of myself here—maybe I should start over a little slower.

It starts out "Ladies and gentlemen, I instruct you that Congress has determined that it is legal to Reynolds and its competitors to manufacture and sell and advertise cigarettes, notwithstanding the fact that cigarettes may be dangerous and addictive.

Accordingly, I hereby instruct you that no liability can be imposed upon Reynolds merely because it manufactured, sold, and advertised the cigarette that Mr. Kenyon allegedly smoked.

Therefore, there is only one remaining claim to consider under Mr. and Mrs. Kenyon's theories of negligence and strict liability. Mr. and Mrs. Kenyon's claim—and Mr. and Mrs. Kenyon's claim and were required to prove by the greater weight of the evidence that there was a feasible and demonstrably safer alternative design that Reynolds could have made available and that was not otherwise on the market and that Mr. Kenyon would have tried and continued to smoke the alternative design and that had Mr. Kenyon done so, he would have avoided entirely the illness of plaintiffs' claim were caused by his smoking." Well, I disagree with this in whole.

THE COURT: Well, I understand that. But I'm trying to find out what your instruction is going to be on the negligence and strict liability.

MR. ACOSTA: The standard jury instructions. Just the standard Florida jury instructions.

* * *

MS. PARKER: May I be heard on two issues relating to this? I just want to point out to the Court that the jury

charges used in Jones and in Carter was the test—the Court gave both a risk utility test and consumer expectations test. That's not the dispute that this proposed on conflict pre-emption goes to.

And also the conflict pre-emption cases from the Supreme Court came out after Carter, so they're not addressed in Carter and I just want to mention that. Also, I wanted to tell Your Honor this is a different—it would be a different charge, but it's very related to the conflict pre-emption and I wanted to go ahead and mention it to the Court, if I could hand this up and have a copy for Mr. Acosta.

As part of a tort reform act, which applies to this case because of the date of the cause of action, there is a—an additional defense that relates. It's the government rule defense and it goes right along with what we've been talking about with respect to conflict pre-emption, so we are going to be asking for a charge on this, and I wanted to go ahead and mention it to Your Honor in the context of discussions that we're having.

* * *

THE COURT: Right, I understand that. I'm just trying to address some of these issues.

MR. ACOSTA: Your Honor, I just—by my silence, I don't know want to waive any objection I have to this new government rule. I don't think it was pled.

THE COURT: I think it's safe to say that y'all don't agree on many issues, and so, if you sit there silent, I'll presume that you may not agree with everything that's being said.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY
CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendant.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	9 October 2001
TIME:	Commencing at 9:05 a.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Notary Public, State of Florida

* * *

MS. PARKER: Your Honor, the second part of our summary judgment motion on pre-emption relates to the idea of conflict pre-emption.

And Your Honor may recall this is what got Schneider on the Hall case. And Your Honor did not rule on this issue. Your Honor reserved ruling and asked Mr. Schneider to permit a proposed jury charge on the issue to the Court. That's what happened in Hall.

Conflict pre-emption is really based on three cases. These are brand new cases, relatively brand new cases from the United States Supreme court. And that's why this issue was not addressed in some of these other tobacco cases that we all hear about. The case like the case down in Miami.

* * *

Again, I'm not asking for summary judgment on everything in the plaintiff's negligence and strict liability claims, I'm only asking for it on the claims that go to this generic attack on cigarettes, or this claim that Reynolds should be liable because we manufactured, sold and advertised our cigarettes knowing that there were health consequences or knowing pharmacological affects on nicotine.

That's just not enough. He has to show something else. And he can go to it and try to prove something else at trial, but he can't make the argument to the jury that we are liable in tort in Florida for what Congress and the United States Supreme Court has said.

Does Your Honor have any questions otherwise I'll wait.

THE COURT: Well, the reason I had asked when this argument was raised in Hall, the reason I had asked to see what you would propose or what—at that time your co-counsel would proposed as a jury instruction was so that I

could—I could see what you're suggesting is—is the—is this area and how it affects the plaintiff's burden. Because it seemed to me it wasn't—at the time, it seems to me it's not necessarily a summary judgment issue as much as a burden issue that's more appropriately addressed in jury instructions. And so that's why I asked for that. That's not to say I'm ruling upon your summary judgment, but which is to stay once I see that—

MS. PARKER: I'll be glad to submit that to Your Honor if we can get something to you. I would like to talk to the co-defendants of Hall maybe we submit it in both of cases. But I can submit something to you in a day or two.

THE COURT: That's fine. You can do that. And at that point, you know, Mr. Acosta not it cut you off on that issue, but I want to see that and then have you respond to what they suggest both as by way of jury instruction and this summary judgment issue. But it seems to me these arguments really don't for my duty—my burden in state court it seems to me this arguments would go more to a burden issue, that I need to instruct the jury on, not—not necessarily something that can be addressed—you know, I know these are Summary Judgments in federal court, but they are Summary Judgments standards somewhat different than mine, the standard that I have to apply.

* * *

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

FLOYD J. KENYON, SR. and FLORENCE KENYON, his wife,	)	
Plaintiffs,	)	Case No. 00-05401 Division D
v.	)	
R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,	)	
Defendant.	)	

DEFENDANT R.J. REYNOLDS COMPANY'S PROPOSED JURY INSTRUCTIONS

* * *

NOT GIVEN OR REQUESTED IN CARTER

(New U.S. Supreme Court Case Law)

DEFENDANT'S PROPOSED INSTRUCTIONS NO. 17
Cigarettes Are A Legal Product

I instruct you that the manufacture of cigarettes is legal, and that cigarettes are a legal product.

AUTHORITY: Lorillard Tobacco Corp. v. Reilly, 121 S.Ct. 2404 (2001); FDA v. Brown & Williamson Tobacco Corp., 120 S.Ct. 1291 (2000); See Fla. Stat. Ann. §§ 569.002, et seq.; 15 U.S.C. §§ 1331, et seq.

NOT GIVEN OR REQUESTED IN CARTER

(New U.S. Supreme Court Case Law)

DEFENDANT'S PROPOSED INSTRUCTIONS NO. 18
The Sale and Advertising of Cigarettes is Not Tortious Conduct
(Conflict Preemption)

I instruct you that Congress has determined that it is legal for Reynolds to manufacture, sell, and advertise cigarettes notwithstanding the fact that cigarettes may be dangerous and addictive. Accordingly, I hereby instruct you as a matter of law that Reynolds cannot be held liable to the plaintiffs merely because it manufactured, sold, and advertised the cigarettes that Mr. Kenyon allegedly smoked.

AUTHORITY: FDA v. Brown & Williamson Tobacco Corp., 120 S.Ct. 1291 (2000); Geier v. American Honda Motor Co., 120 S.Ct. 1913 (2000); Insolia v. Philip Morris Inc., 28 F. Supp.2d 1220 (W.D. Wis. 2000); Lorillard Tobacco Corp. v. Reilly, 121 S.Ct. 2404 (2001); Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608 (1992).

IN THE DISTRICT COURT OF APPEAL

SECOND DISTRICT
LAKELAND, FLORIDA

REYNOLDS TOBACCO COMPANY,	)	
Appellant,	)	SECOND DCA CASE NUMBER
v.	)	2D02-1667
FLOYD KENYON, SR. and FLORENCE KENYON, his wife	)	
Appellees.	)	

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES,
FLOYD J. and FLORENCE KENYON

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Counsel for Appellees

* * *

V. REYNOLDS IS NOT IMMUNIZED FROM LIABILITY BY THE CONFLICT PREEMPTION DOCTRINE.

Reynolds' fifth and final appeal argument is that it is immunized from responsibility for the harm its products caused to Mr. Kenyon by the doctrine of "conflict preemption." According to Reynolds, it cannot be held strictly liable for a defectively designed cigarette because "[b]y not banning or further regulating the design manufacture, and sale of cigarettes, Congress has determined that those activities are legal notwithstanding their well-known dangerous and addictive properties" (Reynolds Br., p. 46). In other words, Reynolds claims to possess a Congressional license, shared by no other industry, to manufacture and sell defectively designed, unreasonably dangerous products to the American public with total impunity—and complete immunity.[13]

One would assume that, before making such an extraordinary claim, Reynolds would have extraordinary authority to support it. Reynolds essentially has none. It relies on a United States Supreme Court decision which addresses preemption only peripherally and does not support its position, and three trial court level decisions, two of which do not involve strict liability and a third which does not even mention conflict preemption.

Moreover, Reynolds ignores decisions of the United States Supreme Court and the Florida Supreme Court which specifically identify the state law tort claims which are preempted by federal tobacco regulation, and a controlling decision of this Court which directly holds that strict liability

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[13] The Kenyons agree that this claim is reviewed *de novo* (*see* Reynolds Br., p. 40 n.15).

design defect claims against cigarette manufacturers are not preempted by federal law.

The preemption doctrine does not concern cigarette design but relates to restrictions on their advertising and promotion. The controlling decision on the preemption of state law tort claims against cigarette manufacturers is *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ("*Cipollone*"). *Cipollone* adopted a straightforward test for determining whether a particular state law tort claim was preempted by federal regulation of the tobacco industry. It stated:

> The central inquiry in each case is straightforward: We ask whether the legal duty that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion," giving that clause a fair but narrow reading.

505 U.S. at 523-24.

In *Carter*, *supra*, the Florida Supreme Court examined the preemption doctrine in the context of a judgment against a cigarette manufacturer based on negligence and strict liability. Relying on *Cipollone*, it held that claims relying on "testing or research practices or other activities unrelated to advertising and promotion" were not preempted, *Carter*, *supra*, 778 So.2d at 940, and affirmed the plaintiff's judgment.

In *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So.2d 1076 (Fla. 2d DCA 2000) ("*Laschke*"), this Court specifically held that strict liability claims against cigarette manufacturers based on design defects are not preempted. *Laschke* also recognized that preemption is controlled by *Cipollone* and, following an analysis of that decision, concluded that claims for negligence and strict liability based

on design defects were not preempted. Specifically, this Court held:

> We therefore affirm summary judgment in favor of Appellees as to the Laschkes' post-1969 negligence and strict liability claims for failure to warn. We also affirm the post-1969 conspiracy to commit fraud through concealment claim insofar as the Laschkes' attempt to allege a duty beyond that imposed by the Labeling Act. The Laschkes' pre-1969 claims for failure to warn and conspiracy to conceal information **survive the motions for summary judgment, as do the negligence and strict liability claims based on design defects** and the conspiracy claims based on misrepresentations of material fact.

766 So.2d at 1078 (emphasis added).[14]

While it has not done so, any argument that Reynolds might make that these precedents are inapplicable because it is relying on "conflict preemption"[15] rather than express preemption has been expressly foreclosed by no less an authority than the United States Supreme Court—twice. First, it is expressly foreclosed in *Cipollone*, which held:

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and

---

[14] Reynolds cites *Laschke* in a footnote, but solely for the proposition that the standard of review of its preemption claim is *de novo*. It does not mention its holding on preemption of strict liability design defect claims.

[15] Conflict preemption arises either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively or when state law is in actual conflict with federal law. *Freightliner Corporation v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) ("*Myrick*").

> when that provision provides a "reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

505 U.S. at 517 (citations omitted).

Cipollone further holds that there is "no general, inherent conflict between federal preemption of state warning requirements and the continued viability of state-common law damage actions." *Id.* at 518.

The Supreme Court had occasion to address this same issue a second time in *Myrick*, *supra*. In that case, the court of appeals had held that the just-quoted language from *Cipollone* amounted to a blanket holding that implied or conflict preemption could never exist when Congress had chosen to include an express preemption clause in a statute. While the Supreme Court held this was not a general rule, it specifically reiterated that: "In *Cipollone*, we did hold that the preemptive scope of the two statutes at issue was governed by the language in each Act." 514 U.S. at 287-288. In short, with respect to tobacco, the doctrine of conflict preemption may not be used to extend the preemption expressly provided by statute.

Reynolds purports to find support for its conflict preemption argument in the United State Supreme Court's decision in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("*FDA*"). *FDA* concerned whether the United States Food and Drug Administration had the authority to regulate cigarettes as a "drug"; the Supreme Court held it did not. The only significant reference to preemption in the *FDA* opinion is the observation that Congress had preempted any further regulation of cigarette labeling. Since the regulation of product labeling is an integral aspect of the Food and Drug Administration's mandate, the Court cited this as supporting its conclusion

that Congress had not intended to grant this agency the authority to regulate cigarettes. Significantly, *FDA* also cites to and relies on *Cipollone*.

Reynolds' other "authority" is equally unpersuasive. *Insolia v. Philip Morris, Inc.*, 128 F.Supp.2d 1220 (W.D. Wisc. 2000) ("*Insolia*"), is a very unusual opinion. It does not involve strict liability, which the opinion notes had been previously removed from the case on an entirely different ground. The decision also acknowledges that it is virtually all *dicta*, as it is devoted to "refuting" a claim that the plaintiffs stated they were not making, namely that the sale and marketing of cigarettes was negligent *per se*. One of the several reasons given by the *Insolia* court for rejecting this non-existent claim was that it would purportedly have been preempted by federal law.

Whatever questionable authority *Insolia* may have does not apply to this case. The Kenyons are not seeking to ban Reynolds from selling cigarettes; they are seeking damages for the harm caused by Reynolds' defectively designed cigarettes.

Reynolds' next "authority," *DuJack v. Brown & Williams Tobacco Corp.*, No. X07-00728225-S (Conn. Super. Ct. 2001), consists of a fragment from what appears to be a trial transcript. Federal preemption is mentioned nowhere in this transcript; the only reference to preemption of any type is to a Connecticut statute which apparently limits causes of action against sellers of products in Connecticut to claims for product liability.

Reynolds' final authority, *Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 2002 WL 1828380 (D.P.R. 2002) ("*Cruz*"), is also inapposite. Relying on *Insolia*, the *Cruz* court held that "plaintiffs are barred from pursuing a state law tort claim based exclusively on the theory that Defendant Reynolds manufactured and sold cigarettes." 2002 WL 1828380 at *7. The *Cruz* court plainly did not consider this ruling as having

anything to do with defective design claims, since these claims are discussed at length later in the same opinion. *See* 2002 WL 1828380 at *8-9.

Reynolds' conflict preemption argument represents a fitting conclusion to its brief. Like many of Reynolds' prior arguments, it is based on mischaracterization of the facts, and fails to cite, or even to acknowledge, adverse authority, including controlling adverse authority and adverse authority to which Reynolds was a party.

CONCLUSION

For the reasons stated, the Kenyons respectfully request that the judgment of the trial court be affirmed.

Respectfully submitted,

/s/

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Counsel for Appellees

DOCKET NO. X07-00728225-S	:	SUPERIOR COURT
ESTATE OF ARLENE B. DUJACK, ET AL	:	JUDICIAL DISTRICT OF TOLLAND
VERSUS	:	AT ROCKVILLE,
BROWN & WILLIAMSON TOBACCO CORPORATION	:	CONNECTICUT
	:	NOVEMBER 13, 2001

B E F O R E:

The Honorable Samuel Sferrazza
Superior Court Judge

AND A JURY

A P P E A R A N C E S:

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ORDER OF THE COURT

Shirley Gordon
Court Monitor

THE COURT: I'm not going to hold you in suspense. I'm going to grant the motion.

The Practice Book allows, on motions for directed verdict, to reserve a judgment, and there are advantages and disadvantages to each. An advantage of reserving the judgment is that you allow the jury to decide the case, and if the evidence is as poor as the judge might think, in the usual case, where evidence is a problem—the absence of evidence is a problem, then if the judge is wrong, an appellate court can simply reinstate the verdict and not have to try to case over again. And issues of adequacy of evidence are often in the mind of the beholder, what inferences are proper and improper, things of that nature.

The disadvantage, of course, is that the parties have to expend money and time and witnesses are called and inconvenienced by it, and so that's balancing. The appellate court has recommended that you reserve judgment in the usual case.

There is an exception, however, and that, I believe, is in a case where it's not the inadequacy of the evidence that causes the Court to consider a directed verdict, but rather the inadequacy of the claim. That is, assuming all the facts, the claim is true, the claim does not set out a viable cause of action which can impose liability on a defendant. In that case, you don't gain anything by reserving judgment. The judge will not give proper instructions to the jury, because the judge, if mistaken, is going to give improper instructions, and charge the matter out of the case anyway, so there's noting to be gained by reserving it. And I believe that's the case we have here.

I'm going to assume, for purposes of this motion, that certain facts are true, that Arlene DuJack did smoke Kool cigarettes, that she became addicted to Kool cigarettes at an early age, that this addiction did her harm, and that the

cigarette smoking that she did caused her lung cancer, and the other injuries that resulted from having the lung cancer.

This is case is brought, as it must be, on a product liability theory. Section 52-572n of our statutes preempts all other bases for causes of action for liability against sellers of products for harm caused by that product. So the only theory that can be pursued is product liability.

Manufacturers and sellers are not, however, absolutely liable for their products. They are not insurers or guarantors of the purchaser's safety. Our Supreme Court has adopted Section 402a of the Restatement Second of Torts, and that requires that the product that was sold must be, quote, "In a defective condition, unreasonably dangerous to the user or consumer," unquote, in order for liability to attach.

We've adopted that early on, and the adoption of that standard was reiterated in Potter versus Chicago Pneumatic Tool Company. That's—pneumatic is p-n-e-u-m-a-t-i-c. It's 241 Connecticut 199, page 214. It was a 1997 case.

Here, there is no claim of a manufacturer's malfunction or error. These cigarettes—the Kool cigarettes that were smoked were manufactured, as they were designed to be manufactured. That's not the claim here. And when that's the situation, where the product is made, the outcome of the product is exactly as the manufacturer intended, then the defect, if any, must be a design defect.

And, again, what we're dealing with here—we have to ascertain what we're not dealing with. We're not dealing with mis-labeling or false advertisement. Those, Judge Bishop, I think, has ruled federally preempts this area, with regard to cigarettes.

We're not dealing with any claim that Kool cigarettes have some peculiar manufacturing process with filters or their papers or any additives or any genetic processing that makes Kool cigarettes different than any other cigarette.

The claim here—the claimed defect here is that Kool cigarettes have nicotine in them. Normally, if you have a design defect, you get into an analysis of consumer expectations, standards, and one factor of that is risk utility. And the Potter case describes that in great detail. But that analysis, in my determination, is inapplicable where the defect claimed in inherent in the product to be sold. It's the unavoidable danger that was discussed in Comments I and Comments K to 402-A.

I should point out that both of those comments, Comment I was adopted by our Supreme Court in Wagner versus Clark Equipment Company, 243 Connecticut 168, a—I believe that's a 1997 case, also, and I think it was at page 198, I'm not sure of that citation. Page 189.

And Commentary K—Comment K was adopted in Vitanza, V-i-t-a-n-z-a, versus Upjohn Company. That's a 2001 case. The citation there is Volume 257 of the Connecticut Reports, 365 at page 374, and it's set forth in one of the footnotes to that case.

What is a cigarette? Well, a cigarette is a nicotine delivery device That's what its purpose is for. That's where the pleasure is derived. We heard from a toxicologist and also the addictionologist, and they both indicated that. The pleasure—the usefulness of this product, if we can use that word, usefulness,—I should probably say the desired effect of the product, the exhilaration, the relaxation, the stimulation, is garnered from the nicotine. Unfortunately, that's what is—causes addiction and lung cancer and other diseases, the presence of nicotine.

You can't claim that gasoline is defective because it's very dangerous, which it is, because it's highly flammable. It's purpose is for combustion. It must be highly flammable; and, therefore, you don't get into consumer expectation questions on that. The product, inherently, must be highly flammable to be gasoline.

It was pointed out in the argument by defense counsel, similarly true with recreational activities such as consuming liquor. Liquor—vodka would not be vodka if it doesn't have grain alcohol in it. It's consumed, it's designed to permit the ingestion of alcohol for whatever pleasurable effects the alcohol has. Unfortunately, it has very great and dangerous side effects. But, as a matter of law, you cannot claim that vodka is defective because it contains grain alcohol.

And, likewise, you cannot make a claim that cigarettes are an unreasonably dangerous or defective product because the nicotine in them causes harm.

Comment I to the Restatement Tort Second—and I'm quoting from it here—quote, "Good tobacco,"—and by good, I think they mean unadulterated, not poisoned, not containing insecticides or other products—"Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful."

And in Comment K, that states, quote, "There are some products which, in the present state of human knowledge, are quite incapable of being more safe,"—let me quote it rather than trying to read my own scribbling. "There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." And it goes on, later on, "Such a product, properly prepared and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous despite the fact that it has this inherent propensity to cause harm."

Now, judges and juries cannot engage in the enterprise of determining which activities, which enterprises, are socially worthy, and which are not. In actuality, the claim here is not that Kool cigarettes, in particular, are defective, but that all cigarettes are defective. The plaintiff's claims are concerning the presence of nicotine, and it is an attack on the

activity of smoking, and the enterprise of manufacturing tobacco cigarettes.

The manufacture, sale, possession and consumption of tobacco cigarettes are a legal activity. Judges and courts cannot ban them, nor impose liabilities, merely for engaging in that activity of smoking, selling and using cigarettes.

Whether cigarettes are a product that are [sic] so dangerous that the social benefits derived from it are not worth the social costs, are not a judicial decision. Those are legislative decisions, for state or federal legislatures, under constitutional strictures.

Based on that, I'm holding that the claim in this case is not a viable one for imposing liability on the defendants, even if all the factual allegations that were permitted are true.

I'm going to indicate that my comments will be transcribed under Practice Book Section 64-1 for purposes of my signature, and for purposes of appeal.

We need to bring the jury in, and I'm going to direct the verdict.

The loss of consortium claim is, of course, derivative, and therefore, it, too, must be directed.

/s/
Sferrazza, Judge

R.J. REYNOLDS
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RJRTH 2003-??

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RJR and BAT Agree to Combine U.S. Assets and Operations

WINSTON-SALEM, N.C.–Oct. 27, 2003–R.J. Reynolds Tobacco Holdings, Inc. (NYSE: RJR) and British American Tobacco p.l.c. (AMEX: BTI) today announced the signing of a definitive agreement to combine the assets and operations of their respective U.S. tobacco businesses: R.J. Reynolds Tobacco Co. (RJRT) and Brown & Williamson Tobacco Corp. (B&W).

The agreement provides for establishing a new publicly traded holding company, Reynolds American Inc., with approximately 150 million shares outstanding. BAT will own 42 percent of Reynolds American Inc. through B&W with existing RJR shareholders owning 58 percent through a one-for-one exchange for stock of the new company. The company expects the transaction to be tax-free to RJR shareholders and to BAT.

The agreement provides for B&W to transfer to RJRT all Master Settlement Agreement liabilities and the corresponding cash balance to cover previously accrued payment obligations. The amount is contingent on the timing of closing the transaction, but averages approximately $750 million during the year. RJR Tobacco will indemnify B&W for all existing and any future litigation relating to its

U.S. business. In addition, the contributed assets of B&W included in the agreement will be debt-free.

RJR will pay BAT $400 million in cash to acquire the stock of Lane Limited, a subsidiary that manufactures several cigar, roll-your-own and pipe tobacco brands and distributes Dunhill tobacco products.

The transaction is expected to close in mid-year 2004, pending the necessary approvals from U.S. regulatory authorities and RJR shareholders, as well as Internal Revenue Service rulings.

The combination will consolidate the second and third largest U.S. tobacco companies. On a combined 2002 basis, Reynolds American Inc. would have annual revenues of approximately $10 billion, annual domestic cigarette volume of 136 billion units, and over 30 percent of the cigarette sales in the United States.

"This agreement marks a milestone for both companies," said Andrew J. Schindler, chairman and CEO of RJR. "The combination of these companies will enable us to achieve tremendous efficiencies, and will greatly enhance our ability to compete effectively in the U.S. market. The merger is expected to be accretive to earnings and provide outstanding value and return to shareholders. RJR and BAT recognize the mutual benefits of this combination and share a strong desire to complete the deal," said Schindler.

"This exciting combination makes both strategic and financial sense," said Martin Broughton, chairman of BAT. "This merger will improve our competitive position in the most important cigarette market in the world. It gives the Group a 42 percent share in a stronger and more sustainable business with an enhanced brand portfolio."

"We believe that the merger is the best way to achieve our long-term strategic ambitions in the U.S. market, while

improving both our earnings per share and our cash flow in the first full year following completion," Broughton said.

The companies have agreed to a multi-year contract for BAT's export product currently produced by B&W to be manufactured by R.J. Reynolds Tobacco. BAT will retain the rights to use all its international trademarks outside the United States.

After the transaction closes, the full integration of B&W's operations into RJRT, including the sales forces, manufacturing operations, and other areas, is expected to take 18 to 24 months. The company plans to consolidate headquarters and operations in Winston-Salem, N.C. The full integration of the companies is anticipated to generate more than $500 million in annualized savings.

Schindler will serve as executive chairman of Reynolds American Inc. for a six-month period after closing and then as non-executive chairman. Susan Ivey, currently president and CEO of B&W, will serve as president and CEO of Reynolds American Inc. Announcements regarding the balance of the executive management team will be made at a later date.

The new board of Reynolds American Inc. will consist of 13 members, including Schindler and Ivey, six directors from the existing RJR board and five directors designated by BAT (three independent and two BAT executives). BAT will receive the rights typically afforded a substantial minority shareholder.

RJR intends to continue paying its annualized $3.80 dividend. Under terms of the agreement, the designated Reynolds American management will recommend to the new board an annual dividend payout policy of approximately 75 percent of net income. After closing, the practical implications of the 42 percent ownership by BAT are likely

to preclude substantial share repurchase programs by Reynolds American Inc.

The agreement includes a 10-year "standstill" provision that generally prevents BAT from buying shares that would increase its holding above 42 percent of the outstanding Reynolds American Inc. stock. Certain limits are also placed on BAT's ability to sell its stock in the new company.

In addition to the combined RJRT, Santa Fe Natural Tobacco Company and Lane Limited will operate as independent subsidiaries of the new holding company.

RJR was advised on the transaction by Lehman Brothers Inc., and J.P. Morgan Securities Inc.

Additional Information and Where To Find It

Reynolds American Inc., the holding company to be formed in the proposed business combination, intends to file a registration statement on Form S 4 that will include a proxy statement/prospectus and other relevant documents in connection with the proposed business combination. INVESTORS AND SECURITY HOLDERS OF R.J. REYNOLDS TOBACCO HOLDING INC. ("RJR") ARE ADVISED TO READ THESE DOCUMENTS WHEN THEY BECOME AVAILABLE, BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED BUSINESS COMBINATION. Investors and security holders may obtain a free copy of the prospectus/proxy statement (when it becomes available) and other documents filed by RJR and Reynolds American Inc. with the SEC at the SEC's web site at http://www.sec.gov. Free copies of the prospectus/proxy statement, when it becomes available, as well as RJR's and Reynolds American Inc.'s related filings with the SEC, may also be obtained from RJR by directing a request to R.J. Reynolds Tobacco Holdings, Inc. at P.O. Box 2866, Winston-Salem, NC 27102 2866, Attn.: Office of

Investor Relations, or by telephone at (336) 741 5165 or on RJR's website, www.RJRHoldings.com.

Forward-Looking Information

Statements included in this news release which are not historical in nature are forward-looking statements made pursuant to the safe harbor provisions of the Private Securities Litigation Reform Act of 1995. Although RJR believes that these expectations are based on reasonable assumptions, it can give no assurance that the business combination, if consummated, will be successful or that other expectations will be realized. Factors that could affect whether the transaction is completed include the satisfaction of all conditions to the business combination that cannot be waived and the satisfaction or waiver of all other conditions, including those described above. Factors that could affect the future performance of Reynolds American Inc. following completion of the transaction, include the substantial and increasing regulation and taxation of the cigarette industry; various legal actions, proceedings and claims arising out of the tobacco business and the claimed health effects of cigarettes that are pending against RJRT or B&W or may be instituted against Reynolds American Inc. or its subsidiaries; the substantial payment obligations and limitations on the advertising and marketing of cigarettes under various litigation settlement agreements; the continuing decline in volume in the domestic cigarette industry; competition from other cigarette manufacturers, including increased promotional activities and the growth of the deep-discount category; the success of new product innovations and acquisitions; the effect of market conditions on the performance of pension assets and the return on corporate cash; any potential costs or savings associated with realigning the cost structure of Reynolds American Inc. and its subsidiaries and otherwise realizing synergies from the combination of RJRT and B&W; and the ratings of RJR's securities. Except as required by the federal securities laws,

we undertake no obligation to publicly update or revise any forward-looking statement, whether as a result of new information, future events or otherwise.

Interests of Participants

RJR, its directors and executive officers and certain other members of management and employees may be deemed to be participants in the solicitation of proxies from RJR stockholders in favor of the proposed business combination. A description of the interests of the directors and executive officers of RJR is set forth in RJR's proxy statement for its 2003 annual meeting, which was filed with the SEC on March 19, 2003. Investors and security holders may obtain additional information regarding the interests of such potential participants in the proposed business combination by reading the prospectus/proxy statement and the other relevant documents filed with the SEC when they become available.

In addition, since the referenced proxy statement, Robert S. (Steve) Miller Jr. was elected to the board of directors of RJR. As of Oct. 27, 2003, Mr. Miller was the beneficial owner of 1,000 shares of RJR's common stock, which does not include 10,000 shares issuable upon the exercise of stock options held by him that are exercisable on or after Jan. 1, 2004. If the proposed business combination is consummated, Mr. Miller's options will be immediately exercisable. Additional information regarding Mr. Miller and any interests he may have in the proposed business combination will be set forth in the prospectus/proxy statement and other relevant documents filed with the SEC when filed with the SEC.

R.J. Reynolds Tobacco Holdings, Inc. is the parent company of R.J. Reynolds Tobacco Company and Santa Fe Natural Tobacco Company, Inc. R.J. Reynolds Tobacco Company is the second-largest tobacco company in the United States, manufacturing about one of every four

cigarettes sold in the United States. Reynolds Tobacco's product line includes four of the nation's 10 best-selling cigarette brands: Camel, Winston, Salem and Doral. Santa Fe Natural Tobacco Company, Inc. manufactures Natural American Spirit cigarettes and other tobacco products, and markets them both nationally and internationally. Copies of RJR's news releases, annual reports, SEC filings and other financial materials are available on the company's website, www.RJRHoldings.com.

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No. 03-687

In The Supreme Court of the United States

R. J. REYNOLDS TOBACCO CO.,

Petitioner,

v.

FLORENCE KENYON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FLOYD J. KENYON, SR.,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Second District Court Of Appeal

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR NOT GRANTING THE WRIT

An overriding reason for not granting the petition for writ of certiorari in this case is that the Petitioner, R. J. Reynolds Tobacco Company ("Reynolds"), has misrepresented the proceedings in the Florida state courts below. Reynolds claims in its petition that this case presents the following question: "Whether state law permitting a jury to impose liability on tobacco companies for the mere manufacture and sale of cigarettes, without more, conflicts with and is preempted by congressional policy allowing the production and sale of cigarettes in the United States." No such question is presented by this case, and there is no Florida state law or policy which imposes liability on cigarette manufacturers on this basis.

Reynolds was not found liable for merely producing and selling cigarettes. Rather, utilizing principles employed in product liability cases generally, a jury found Reynolds strictly liable for producing and selling defectively designed cigarettes and awarded Respondent $165,000 in damages. That same jury found in Reynolds' favor on Respondent's three other theories of liability, a result facially inconsistent with Reynolds' claim that Florida law imposes automatic liability on tobacco companies merely for producing and selling cigarettes.

Reynolds' assertion that the Florida trial and appellate courts "permitted cigarette manufacturers to be held liable under state tort law for merely manufacturing cigarettes" (Pet., p. 2), is refuted even by the limited trial excerpts included in Reynolds' appendix, as well as by materials Reynolds failed to bring to this Court's attention. For example, Reynolds relies heavily on the denial of its request for a special jury instruction that it was legal

for Reynolds to manufacture, sell and advertise cigarettes and that Reynolds could not be held liable on that basis. Pet., pp. 4-5. However, the record demonstrates that the reason the trial court rejected Reynolds' request for this non-standard instruction was not because it disagreed with its substance, but because the trial court concluded that its content was already embodied in other instructions. The trial court stated at the charge conference: "I think that the way the instruction is currently crafted, articulating the standards under state law by its very nature recognizes the fact that products were manufactured legally by your [client]." Pet. App. 28a. Thus, far from endorsing automatic liability for cigarette manufacturers, the trial court acknowledged on the record Reynolds' legal right to manufacture and sell cigarettes; it simply declined to give a redundant instruction on concepts already embodied in existing instructions.

Reynolds further argues that "Kenyon's counsel argued throughout the trial as if Reynolds could be held liable for simply manufacturing and selling cigarettes." Pet., p. 5. Reynolds' principal "factual support" for this claim is that, during the cross-examination of a Reynolds employee, Dr. David Townsend, "Kenyon's counsel repeatedly elicited testimony to establish that no cigarette is safe." Pet., p. 6. Reynolds quotes excerpts from that cross-examination in its petition. *Id.*

What Reynolds fails to disclose is that this issue and evidence was interjected into the trial by Reynolds itself long before Dr. Townsend testified. During the cross-examination of plaintiff, Floyd Kenyon (Mr. Kenyon has since died, and Respondent is his estate), Reynolds' counsel elicited testimony from Mr. Kenyon that he did not remember ever having seen a statement by Reynolds that

cigarettes were safe to smoke or were not dangerous to a smoker's health:

> Q. And when we asked in your deposition if you'd ever seen any statement by R. J. Reynolds that cigarettes were safe to smoke, you said no, you didn't remember any such statement? Correct?
>
> A. Yes.
>
> Q. Correct?
>
> A. Yes.
>
> Q. And you've also testified when we took your deposition that you don't remember any statement you ever heard from R. J. Reynolds that cigarettes are not dangerous to your health? You never heard Reynolds say it was not dangerous to your health; correct?
>
> A. That's correct.

App. 16-17.

Reynolds' cross-examination of Respondent's expert, Dr. Allan Goldman, was even more direct. Reynolds' counsel not only elicited Dr. Goldman's opinion that there was no safe cigarette (an opinion identical to Dr. Townsend's), but also asked Dr. Goldman if he was aware that it was also Reynolds' position that there was no safe cigarette:

> Q. Now, as you testified before, you agree that there's no such thing as a safe cigarette? Correct?
>
> A. Not so far, correct.

* * *

> Q. And are you aware of R. J. Reynolds' position that there is no safe cigarette? Did you know that?
>
> A. I do now.

App. 14.

Further, in closing argument, Reynolds' counsel affirmatively relied on Dr. Townsend's testimony that there was no safe cigarette, claiming this knowledge was the reason Reynolds had "worked diligently to try to make a cigarette safer":

> And Dr. Townsend told you, there's no such thing as a safe cigarette. There's no such thing as a safe cigarette. But Reynolds has worked hard. Reynolds has worked diligently to try to make a cigarette safer, to try to reduce the health risks that are inherent in cigarettes. Knowing that cigarettes have health risks, knowing that are inherent in cigarettes. Knowing that cigarettes have health risks, knowing that there is no safe cigarette, our society has nevertheless decided that those should be legal, lawful products for adults who choose to smoke. The evidence is uncontradicted here that Reynolds spent tremendous amounts of time, money and energy on its cigarette design efforts.

App. 1-2.

Reynolds' claim that Respondent's questioning of Dr. Townsend on whether there was a "safe cigarette" demonstrates that Reynolds was held liable merely for manufacturing and selling cigarettes is frivolous. Reynolds presented the same evidence in its examination of Respondent's witnesses before Dr. Townsend testified, and

Reynolds even affirmatively relied on Dr. Townsend's "safe cigarette" testimony in its closing argument.

Reynolds also attempts to support its argument by citing to isolated phrases culled from the thousands of pages of transcript in this multi-week trial; many of these citations are incomplete and misleading. For example, Reynolds claims that Kenyon's counsel described his position at the charge conference in the following terms: "Kenyon was 'injured by a defective product' that 'shouldn't have been available to him in the that they were in. Period.'" Pet., p. 7. Kenyon's counsel's actual quote was as follows: "What we contend is that they should have cured the defect in the products that he smoked. And that they shouldn't have been available to him in the form that they were in. Period. That's what the plaintiff contends, that they were defective and unreasonably dangerous in that sense." Pet. App. 26a. When the language Reynolds has omitted is included, it becomes apparent that Kenyon's counsel was arguing that cigarettes containing the uncured defects Respondent had proved at trial should not have been available to his client, not that it was inherently improper to market cigarettes *per se*.

Reynolds also implies that, at the hearing on Reynolds' motion for directed verdict, Kenyon took the position that Reynolds could be held liable simply for manufacturing and selling cigarettes; as "authority" for this claim, Reynolds cites to a portion of the transcript in which Kenyon's counsel does not even speak. Pet., p. 8. In fact, Kenyon's counsel took exactly the opposite position at the hearing, advising the court that he was not contending that Reynolds was liable because they sold cigarettes, but that their liability was based on other tortious conduct which had been proved at trial:

> Essentially, what Reynolds is now arguing is that they should have some sort of sovereign immunity because Congress said you could sell a cigarette; but there's a lot more to it than just the fact it might have been legal to sell them. They did other things that were tortious, and that's what we had to prove. We didn't prove our case simply on the basis that they were liable because they sold cigarettes. We had a lot of other elements to prove, and we proved it.

Pet. App. 17a.

In summary, Reynolds' claim that it was held liable in the Florida courts for merely manufacturing and selling cigarettes is a fabrication. Rather, the jury found that design defects in the cigarettes Respondent smoked made them more dangerous than they should have been.

Ample evidence of these design defects was also presented at trial. For example, evidence was presented of alternative cigarette designs developed by Dr. Claude Teague, Reynolds' assistant director of research and development, during the late 1960's. A current Reynolds employee claimed these ideas "didn't go anywhere" because "those concepts weren't reduced to practice and demonstrated to actually work." App. 7. This misses the point. It was Reynolds that could have, and should have, reduced Dr. Teague's concepts to practice.

There was also evidence of alternative, safer designs whose technological feasibility was undisputed, such as a greater use of reconstituted tobacco. Reconstituted tobacco is made by taking small pieces of tobacco and some tobacco stems, adding water, then extracting the water with a centrifuge. The solid material which is left is then rolled into a sheet. The tobacco reconstitution process has been

known since at least the late 1940's, when Reynolds claims to have invented it. App. 4-5.

Reconstituted tobacco, when it burns, generates less tar and nicotine than regular tobacco. Despite its health advantages, reconstituted tobacco is typically used in only 15% to 20% of a cigarette's blend. The only reason offered by Reynolds' expert for not using a higher percentage was that "if you get to very high levels, it starts altering the taste characteristics and it's really not acceptable." App. 5-6.

Most shocking, however, was the evidence that the methods by which Reynolds' tobacco was processed greatly enhanced the cancer-causing properties of natural tobacco. Testimony was offered regarding the "flue-curing" of tobacco, a process in which tobacco is heated inside enclosed barns or sheds by means of propane heaters. Flue-cured tobacco contains dramatically higher levels of tobacco-specific nitrosamines[1] than natural tobacco because the exhaust gases from the propane heaters used to heat the tobacco contain nitric oxide, a toxic gas which reacts with the nicotine in the tobacco leaf during the flue-curing process to produce tobacco-specific nitrosamines. App. 10-11.

The "cure" for flue-curing is extraordinarily simple. The exhaust gases from the propane heaters are vented to the outside by a heat exchange process, rather than

---

[1] Nitrosamines are cancer-causing compounds known for their ability to produce cancer even in low concentrations, as well as by their ability to produce cancers in places far removed from the site of administration.

released inside the barn so that they can no longer react with nicotine in the tobacco leaf. This simple design change results in reductions of more than 90% in tobacco-specific nitrosamines. App. 11.

Reynolds' expert, Dr. David Townsend, acknowledged that Reynolds had identified the presence of nitrosamines in tobacco smoke in the 1960's, and of tobacco-specific nitrosamines in the 1970's. App. 9. However, at trial, more than thirty years later, Dr. Townsend admitted that the tobacco cured using the heat exchange process was just beginning to appear in cigarettes, and that it would be another two years before all Reynolds' cigarettes would contain this tobacco. App. 12.

Because Reynolds' contention that it was held liable merely for manufacturing and selling cigarettes is false, it is unnecessary to address Reynolds' arguments about the legal implications of this non-existent state of facts. Respondent notes, however, that Reynolds' petition also misinterprets this Court's prior precedents on the preemption of tobacco product liability actions.

Reynolds bases its legal argument on the claimed implied preemptive effect of the 1965 Federal Cigarette Labeling and Advertising Act (the "1965 Act"), and its successor, the Public Health Cigarette Smoking Act of 1969 (the "1969 Act"). However, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) ("*Cipollone*"), this Court issued a definitive holding regarding preemption under both the 1965 and 1969 Acts, stating that their preemptive effect was limited to the express preemption of state laws incorporated into § 5 of each Act. Specifically, this Court held:

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections.

505 U.S., at 517 (citations omitted).

This Court's holding in *Cipollone* that: "[t]he pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act," could not have been clearer. However, despite this "on all fours" precedent to the contrary, Reynolds argues in its petition that the 1965 and 1969 Acts impliedly preempt state law causes of action beyond those expressly preempted under § 5 of each Act. Reynolds essentially argues that *Cipollone* no longer represents controlling law because it was purportedly based on the now-discarded view that implied preemption cannot exist where a statute expressly pre-empts state law.

Reynolds' recipe for reaching this conclusion begins with *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), in which this Court held that the presence of express preemption provisions in a federal statute does not foreclose further implied conflict preemption of state law causes of action. Reynolds then mixes in selected statements from *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), to the effect that Congress has foreclosed the removal of tobacco products from the market and, from this brew, purports to distill the inference that the 1965 and 1969 Acts impliedly preempt any state law cause of action which adversely affects cigarette manufacture.

Under any circumstances, the reliance on such an inference as the basis for rejecting a recent and direct holding of this Court would be highly questionable; in this case, it is also demonstrably wrong. Reynolds' "analysis" ignores this Court's holding in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) ("*Myrick*"), a decision which conclusively refutes not only the conclusion but also the rationale of Reynolds' argument. In *Myrick*, the court of appeals had interpreted *Cipollone* as announcing a categorical rule that implied preemption could not exist when Congress had chosen to include an express preemption clause in a statute. This Court granted certiorari to clarify that the presence of an express preemption clause in a statute does not foreclose the possibility of implied preemption. However, this Court also went on to expressly reaffirm *Cipollone*'s specific holding that the preemptive effect of the 1965 and 1969 Acts was governed exclusively by the express language of each Act: "In *Cipollone* we did hold that the pre-emptive scope of the two statutes at

issue was governed by the language in each act." 514 U.S., at 287-88.

The Court then went on to explain that its holding to that effect in *Cipollone* had not been based solely on the fact that each of these Acts included express preemption of certain state laws, but was the product of a conflict preemption analysis of these statutes, stating:

> Indeed, just two paragraphs after the quoted passage in *Cipollone*, we engaged in a conflict pre-emption analysis of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282, as amended, 15 U.S.C. § 1311 *et seq.*, and found "no general inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions." 505 U.S., at 518, 112 S.Ct., at 2618.

514 U.S., at 288.

Myrick thus conclusively refutes Reynolds' core contention that *Cipollone* is no longer controlling because it was predicated on the view that an express preemptive clause precludes implied preemption. As *Myrick* makes clear, the *Cipollone* court fully appreciated that implied preemption could co-exist with an express preemptive clause, but simply held that, with respect to the 1965 and 1969 Acts, there was "no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions." 514 U.S., at 289.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife

Plaintiffs,

-vs-

R. J. REYNOLDS
TOBACCO COMPANY,
a foreign corporation,

Defendants.
_____/

Case No. 00-5401
Division: "D"

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 5 Hillsborough County Courthouse Tampa, Florida
DATE:	10 December 2001
TIME:	Commencing at 1:30 p.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

[3697] MS. PARKER: You heard Dr. Townsend testify about everything that Reynolds had done. You heard him talk about his colleagues, that these were hard-working people, they were good people, who were trying their best to create a safer cigarette.

And Dr. Townsend told you, there's no such thing as a safe cigarette. There's no such thing as a safe cigarette.

But Reynolds has worked hard. Reynolds has worked diligently to try to make a cigarette safer, to try to reduce the health risks that are inherent in cigarettes. Knowing that cigarettes have health risks, knowing that there is no safe [3698] cigarette, our society has nevertheless decided that those should be legal, lawful products for adults who choose to smoke.

The evidence is uncontradicted here that Reynolds spent tremendous amounts of time, money and energy on its cigarette design efforts. And it's also uncontradicted that Reynolds investigated every single serious suggestion on what to do to create a safer cigarette.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife

Plaintiffs,

-vs-

Case No. 00-5401
Division: "D"

R. J. REYNOLDS
TOBACCO COMPANY,
a foreign corporation,

Defendants.
_____/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	26 November 2001
TIME:	Commencing at 1:44 p.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

[1783] MS. PARKER: Let's take this chart – the second chart down, filter modifications, and let's go to the next item you have on the chart here, and that's reconstituted tobacco.

And do you have a chart that explains to the jury about what reconstituted tobacco is?

DR. TOWNSEND: Yes (changing demonstrative aid).

MS. PARKER: What is it?

DR. TOWNSEND: Reconstituted tobacco is a process that Reynolds invented back in the late '40s, late 1940s. And the purpose of that invention was to take pieces of tobacco that was too small to make into a cigarette, real small pieces of tobacco, and reconstitute them and make them into pieces that are [1784] large enough to make into tobacco rods. So, that was the basic reason that Reynolds originally invented.

The basic process looks something like this: You get small pieces, and even some stems, that come out of the leaf process. Because in leaf processing, they primarily don't have to look for laminate in between these stems. And then it generates a lot of small pieces as well. Some of it contains some stems, all of this material then goes into a centrifuge. Water is added. The water extracts a lot of tobacco solid – water solubles, includes compounds; also, includes nicotine.

So, all of this is extracted out. So, all of that is extracted out, and the water – the water extract goes over to a holding tank. The pulp that's left from that extraction – the cellulose pulp that's left is made into a paper sheet using conventional paper technology. So it's just like a paper sheet.

It comes out, the water soluble are sprayed or reapplied to the paper sheet and then it goes into to tobacco pulp, tobacco sheet. This is still tobacco, and then it goes

into a cutter and cut into pieces that are large enough to make into [1785] cigarettes. So, again, it's a way to take small pieces and turn them into bigger pieces.

MS. PARKER: Dr. Townsend, does Reynolds add nicotine in any of its – to the reconstituted tobacco that's used in any of its commercial cigarettes?

DR. TOWNSEND: No, it doesn't, and it never has.

MS. PARKER: How does – tell the jury, how does the tar and nicotine in a reconstituted tobacco sheet compare to the tar and nicotine in a tobacco sheet or tobacco that's just from the leaf, its not through this reconstituted process?

DR. TOWNSEND: Reconstituted tobacco, when it burns, generates less tar and less nicotine by virtue of two things: One is the stems and the materials that are used in making this generate less tar when burned. That's why it's general reduction technique. It also generates less nicotine because stems contain very really little nicotine – very little nicotine. And also some nicotine is lost in this process. So, of the nicotine that goes in, there's less out the back end of this process. So, this is a general reduction technique.

* * *

[1787] MS. PARKER: How long has Reynolds been using this [1788] reconstituted tobacco process?

DR. TOWNSEND: We first used it commercially when we introduced the Winston cigarette in 1954.

MS. PARKER: And has it been used in Camel cigarettes?

DR. TOWNSEND: Yes.

MS. PARKER: Has it been used in Salem cigarettes?

DR. TOWNSEND: Yes.

MS. PARKER: Was Reynolds' use of this process, this reconstituted tobacco process, was that in any way a secret?

DR. TOWNSEND: No, it really wasn't; and, in fact, our competitors tried to copy this process when they learned of it.

* * *

[1792] MS. PARKER: What percentage of a tobacco blend is reconstituted?

DR. TOWNSEND: Typically it would be on the level of 15 to 20 percent in the blend.

MS. PARKER: Why don't you use more than that?

DR. TOWNSEND: Well, because it's – If you get to very high levels, it starts altering the taste characteristics and it's really not acceptable.

* * *

[1908] MS. PARKER: Dr. Townsend, are you familiar with some documents authored by Claude Teague that reflect some ideas that he had from the late '60s about design alternatives?

DR. TOWNSEND: I'm familiar with a number of Dr. Teague's documents, yes.

MS. PARKER: Okay. And were any of Dr. Teague's beliefs about – set forth in these documents, were any of those safer, feasible alternative cigarette designs?

DR. TOWNSEND: I can't recall a single one that I would consider an alternate, safer cigarette design. I think Dr. Teague generated a lot of ideas and I think his ideas really, at least particularly on product development, didn't get into – didn't go anywhere. You know, mainly because they were really concepts and those concepts weren't reduced to [1909] practice and demonstrated to actually work.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife

Plaintiffs,

-vs-

Case No. 00-5401
Division: "D"

R. J. REYNOLDS
TOBACCO COMPANY,
a foreign corporation,

Defendants.

_____/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	26 November 2001
TIME:	Commencing at 9:08 a.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Notary Public, State of Florida

* * *

[1749] MS. PARKER: What is that? Will you tell the jury what are nitrosamines?

DR. TOWNSEND: Nitrosamines are a group of compounds, a class of compounds, that are formed when

secondary means react with nitric oxide or nitrates – [1750] particularly nitric oxide. And it forms a compound that's fairly reactive. So, it's a general class of compounds.

MS. PARKER: Are introsamines definitely in cigarettes smoke?

DR. TOWNSEND: Yes.

And back in the '60s, of course, that was one of questions was: Are nitrosamines found in cigarette smoke? And yes, there are a number of volatile nitrosamines found in cigarette smoke.

And then into the '80s – '70s, we found that there are, in fact, some nitrosamines that are specific to tobacco. And we call those tobacco-specific nitrosamines. They are found only in tobacco.

MS. PARKER: Here it is. I didn't see it at first. Could you write that up on the easel for us?

DR. TOWNSEND: Which part? Nitrosamines?

MS. PARKER: Maybe if you could put nitrosamines, and then you said there was some specific to tobacco? Maybe if you could – write that beside there.

DR. TOWNSEND: I'll call it tobacco-specific nitrosamines, TSNA.

MS. PARKER: All right.

DR. TOWNSEND: So, there are two types of [1751] nitrosamines. Regular nitrosamines that are found in tobacco smoke, and in other things, like bacon. And then there are tobacco-specific nitrosamines that are found only in tobacco.

MS. PARKER: Has Reynolds done anything to respond to the fact that there are nitrosamines in the smoke?

DR. TOWNSEND: Yes, we have.

In fact, a significant amount of work was conducted to figure out which nitrosamines were present, how much, and ways to reduce or eliminate them. And, in fact, the more volatile nitrosamines are selectively removed by ciliostatis filters. That's for the regular nitrosamines are non-tobacco specific.

Turning to the tobacco-specific nitrosamines. We've conducted a lot of research over the years. Again trying to quantify. These are very reactive molecules and very difficult to develop analytical test methods for them. We were successful. Quantitated the levels and we did successfully figure out how to reduce tobacco-specific nitrosamines in flue-cured tobacco.

And with that finding, we've actually put that into practice and are working on ways to reduce tobacco-specific nitrosamines in burning [1752] tobacco.

MS. PARKER: Is that process that you just told us about, about what Reynolds does, to try to reduce the – I call it TSNAs?

DR. TOWNSEND: TSNA.

MS. PARKER: TSNA. Is that something that Reynolds has kept secret or is that public or –

DR. TOWNSEND: No, actually we made our findings public.

What we found specifically, was we found that tobacco-specific nitrosamines are formed during the curing of tobacco, of flue-cured tobacco. So the farmer will take tobacco out of the field, place it in a barn, and then in that barn there's a propane burner to heat – heat the contents of the barn. And the farmer would actually raise the temperature inside the barn, hold it at a certain temperature for a certain period of time, and then raise it again to another temperature, hold it for a certain period of time. And there was a prescription or a program that the farmer goes through to cure the tobacco.

By having a propane burner in the barn, the exhaust gases from that propane burner actually contained a lot of nitric oxide. The nitric oxide [1753] that was in the exhaust gas which was in the barn reacted with the nicotine in the tobacco leaf and produced tobacco-specific nitrosamines. TSNAs are reaction products from nicotine and nitric oxide.

Once we discovered that, then the solution was pretty obvious, don't have the combustion gas in the barn during curing.

So, we went in and actually did field studies where we converted barns to heat exchange barns, a lot like a radiator, so the – exhaust gas from the burner never goes inside the barn, it goes through a heat exchanger, and then is vented outside, but the heat stays in the barn or supposed to be.

So, the farmer then in these field trials cure the tobacco with these heat exchanges and we found dramatic reductions, more than 90 percent reductions in TSNAs in flue-cured tobacco.

* * *

[1755] MS. PARKER: How far along is Reynolds now in implementing this process?

DR. TOWNSEND: We made the decision to convert all of our flue-cured tobacco to this low TSNA. As a result, we had to contract with farmers to do that. We had to convert all of the barns, any exchange barns. And we are well into that process.

In fact, some of the first tobacco that's been cured and aged – because tobacco has to go through an aging process as well – the first tobacco that's coming out of this, out of these contracts is starting to work its way to cigarettes now. It will happen within approximately two years from now, all of the flue-cured tobacco used will be low TSNA.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife

Plaintiffs,

-vs-

Case No. 00-5401
Division: "D"

R. J. REYNOLDS
TOBACCO COMPANY,
a foreign corporation,

Defendants.

_____/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	20 November 2001
TIME:	Commencing at 1:30 p.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

[1382] MS. PARKER: I have just a few more questions. Let me ask you some questions about your views on cigarettes.

DR. GOLDMAN: Okay.

MS. PARKER: Now, as you testified before, you agree [1383] that there's no safe cigarette? Correct?

DR. GOLDMAN: Not so far, correct.

MS. PARKER: And you don't even know if it's possible to produce a safe cigarette; correct?

DR. GOLDMAN: Correct.

MS. PARKER: And no United States government office or government agency has ever identified or endorsed any cigarette brand as safe; correct?

DR. GOLDMAN: Not that I know.

MS. PARKER: And similarly, no public health organization like the American Cancer Society or the American Lung Association – no public health society has ever endorsed a particular cigarette as being safe; correct?

DR. GOLDMAN: Not that I know, correct.

MS. PARKER: And are you aware of R. J. Reynolds' position that there is no safe cigarette? Did you know that?

DR. GOLDMAN: I do now.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife

Plaintiffs,

-vs-

Case No. 00-5401
Division: "D"

R. J. REYNOLDS
TOBACCO COMPANY,
a foreign corporation,

Defendants.

_____/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	19 November 2001
TIME:	Commencing at 1:40 p.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Notary Public, State of Florida

* * *

[1152] MS. PARKER: And, Mr. Kenyon, you've never told anyone that you believed that smoking cigarettes was safe; correct?

MR. KENYON: I never told anybody that I thought smoking cigarettes was safe.

MS. PARKER: And you never told anybody that you thought smoking does not cause lung cancer; correct?

MR. KENYON: I – I don't – I don't think I would even get into a conversation like that, no.

MS. PARKER: And no one has ever told you that the Surgeon General's warnings don't apply to you? No one has ever said that to you; isn't that correct?

MR. KENYON: No one has ever said that to me.

MS. PARKER: And you've never seen a newspaper article or a magazine article that said smoking was safe; correct?

[1153] MR. KENYON: Well, I have read and seen smoking advertisements which gave the connotation that smoking was safe, yes.

MS. PARKER: Well, I'm going to ask you about ads in a few minutes. I'm asking now about newspapers and magazine articles, articles that appeared.

MR. KENYON: I have not.

MS. PARKER: You have never seen one that says smoking was safe?

MR. KENYON: Not that I remember.

MS. PARKER: And when we asked in your deposition if you'd ever seen any statement by R. J. Reynolds that cigarettes were safe to smoke, you said no, you didn't remember any such statement? Correct?

MR. KENYON: Yes.

MS. PARKER: Correct?

MR. KENYON: Yes.

MS. PARKER: And you've also testified when we took your deposition that you don't remember any statement you ever heard from R. J. Reynolds that cigarettes are not dangerous to your health? You never heard Reynolds say it was not dangerous to your health; correct?

MR. KENYON: That's correct.

MS. PARKER: And also in your deposition, you [1154] testified that you don't remember ever hearing R. J. Reynolds say that cigarettes are healthy?

MR. ACOSTA: Your Honor, I need to object. That's not a proper issue.

THE COURT: I'll overrule. Go ahead and answer, if you can.

MR. KENYON: Say it again.

MS. PARKER: During your deposition, you testified also that you never remember hearing any statement from R. J. Reynolds that cigarettes are healthy? Correct?

MR. KENYON: I – correct.

* * *

Supreme Court, U.S.
FILED
JAN 5 - 2004
OFFICE OF THE CLERK

No. 03-687

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO.,

Petitioner,

v.

FLORENCE KENYON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FLOYD J. KENYON, SR.,

Respondent.

On Petition for a Writ of Certiorari to the Florida Second District Court of Appeal

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As Reynolds demonstrated in its petition, the Florida state courts have blatantly disregarded this Court's precedent on a recurring federal question of tremendous importance—namely, whether federal law preempts state laws and rules permitting a jury to impose liability on tobacco companies for the mere manufacture and sale of cigarettes. In *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) ("*Brown & Williamson*"), and *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) ("*Geier*"), this Court concluded, respectively, that federal policy prohibits a ban on the manufacture of cigarettes and that States cannot, consistent with conflict preemption principles, impose tort liability on a manufacturing practice that Congress sanctions. Pet. 9-12. Taken together, these cases stand for the proposition that tobacco companies cannot be held liable for merely manufacturing cigarettes as such liability would be conflict preempted. Ignoring this precedent, the Florida Circuit Court for the Thirteenth Judicial Circuit and the Second District Court of Appeal permitted a jury to impose liability on Reynolds simply for manufacturing cigarettes. *Id.* at 12-14. The District Court of Appeal also refused to publish the reasons for its erroneous decision, thereby precluding the Florida Supreme Court from correcting this legal error or issuing an opinion. *Id.* at 22-23.

Kenyon's opposition fails to refute these basic points. Kenyon does not dispute the importance of the question presented, its potential to impact thousands of cases, or the gamesmanship of the lower court. *Id.* at 21-22. Rather, knowing that there is no valid legal argument to support the decision below, Kenyon attempts to recast this case. Kenyon argues that the conflict preemption question presented is not implicated here because the jury did not hold Reynolds liable for merely manufacturing cigarettes. In Kenyon's view, the jury found Reynolds "strictly liable for producing and selling defectively designed cigarettes" (Opp'n 1), specifically for failing to adopt "alternative, safer designs" of cigarettes. *Id.* at 6. This theory of liability, however, is inconsistent with

Kenyon's position in the lower courts, irreconcilable with the jury's verdict and contrary to the record.

Kenyon's opposition (Opp'n 8-11) in fact demonstrates the wrong-headed legal analysis adopted by the courts below. As in the lower court proceedings, Kenyon argues that conflict preemption principles do not apply in tobacco cases and that *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) ("*Cipollone*"), holds that tobacco claims are subject only to "the express preemption of state laws." Opp'n 8. This argument sorely misreads *Cipollone* and fails to account for the Court's later decisions in *Geier* and *Brown & Williamson*. Accordingly, this Court's summary reversal of the Florida court's decision is both necessary and appropriate.

I. KENYON WRONGLY ASSERTS THAT THE QUESTION PRESENTED IS NOT IMPLICATED HERE.

Kenyon's principal argument in opposition is that "Reynolds was not found liable for merely producing and selling cigarettes" but for "producing and selling defectively designed cigarettes." Opp'n 1. Specifically, Kenyon asserts that Reynolds was held liable for failing to adopt "alternative, safer designs" of cigarettes. *Id.* at 6. This argument is flatly wrong.

As an initial matter, the claim that the jury's verdict rests on some alternative legal theory (Opp'n 4-8) is inconsistent with Kenyon's position in the courts below. Pet. 12-15; Pet. App. 16a-17a, 50a-56a. Heretofore, Kenyon has defended the jury's verdict by arguing that "with respect to tobacco, the doctrine of conflict preemption may not be used to extend the preemption expressly provided by statute" (Pet. App. 54a), not by concocting an alternative rationale for the jury's verdict. *See also id.* at 16a-17a (arguing to circuit court that conflict preemption does not apply).

Indeed, this argument is remarkable because Kenyon did not even present this alternative-design theory of liability to the jury. Kenyon repeatedly asserted at trial that "*[w]e don't have a claim that they should have made some alternative design product.*" Pet. App. 26a (emphasis supplied). Instead, Kenyon argued "that [cigarettes] shouldn't have been available to [Kenyon] in the form that they were in. Period. That's what the plaintiff contends, that they were defective and reasonably dangerous in that sense. Now they claim, well, you know, we couldn't have made them any other way or something like that. That's their defense." *Id.* Kenyon failed to call a single witness to testify about this alternative-design theory. For this reason, the opposition cites *no* testimony by Kenyon's experts demonstrating some supposed alternative cigarette design. The opposition references only testimony from Reynolds' examination of its own expert showing that *no* safer, commercially feasible alternative in fact exists.[1] Having failed to even argue alternative design as a theory of liability at trial, Kenyon's current claim that the jury based its verdict on this theory is incredible.

In addition, Kenyon's contorted view of the proceedings below is irreconcilable with the jury's actual verdict. The jury concluded that there was *no* "negligence on the part of Defendant R.J. Reynolds Tobacco Company for failing to exercise reasonable care in the design of its products." Pet. App. 6a. It nonetheless concluded that Reynolds' cigarettes were "defectively designed." *Id.* There is only one way to

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[1] The fact that Reynolds argued that there are no safe alternative cigarette designs and no safe cigarettes (Opp'n 2-5) is irrelevant to the pertinent legal error. Under *Brown & Williamson* and *Geier*, Reynolds' argument was both appropriate and correct. Pet. 9-16. The error occurred when Kenyon misused this defense, by arguing that Reynolds should be liable for producing cigarettes "period" (*see* Pet. 4-8), and the jury based its verdict on this argument.

reconcile the jury's conclusion that Reynolds was *not negligent* in designing its cigarettes but nonetheless produced a defective product: the jury concluded that cigarettes are never safe and held Reynolds liable for manufacturing them. *See Light v. Weldarc Co.*, 569 So.2d 1302, 1303 (Fla. 5th Dist. Ct. App. 1990).

In all events, the jury could not have based liability on some alternative design claim because there was *no* evidence that Kenyon would have used these alternative products, as was required for Kenyon to prevail. *See* Pet. App. 12a, 25a-26a. In Kenyon's view, this evidence was unnecessary precisely because "[w]e don't have a claim that they should have made some alternative design product." *Id.* at 26a.

Kenyon's specific references to the record also fail to support this argument. Contrary to Kenyon's claim (Opp'n 1-2), the lower court did not conclude that the concepts of conflict preemption were subsumed in its jury instructions. The court, indeed, recognized that Reynolds' conflict preemption argument was squarely raised by this case when it observed that it was an "appropriate appellate issue." Pet. App. 17a. The trial court's repeated rejection of Reynolds' conflict preemption argument—by denying Reynolds' motion for summary judgment, motion for a directed verdict and motion for a new trial on this issue—further demonstrates that the court did not acquiesce in Reynolds' preemption argument.

Kenyon's reading of the instruction is also just wrong. With respect to cigarette manufacturing, Reynolds requested two independent instructions: an instruction that cigarette manufacturing is legal (proposed instruction seventeen) and an instruction on conflict preemption (proposed instruction eighteen). Pet. App. 48a-49a. In the passage Kenyon cites, the circuit court concluded only that the first instruction on the legality of manufacture, *not* the conflict preemption instruction, was unnecessary because the jury instruction "recognizes the fact that [Reynolds'] products were

manufactured legally." Opp'n 2 (quoting Pet. App. 28a). The judge refused to give the key instruction that Reynolds could not be held liable in tort merely for manufacturing a lawful product, because it accepted Kenyon's wrong reading of Supreme Court precedent. Pet. App. 17a.

The snippets of testimony Kenyon cites (Opp'n 6-8) to attempt to demonstrate some alternative verdict are similarly inadequate to support this argument. For example, the jury could not have concluded that Reynolds was liable for failing to employ cigarette "designs developed by Dr. Claude Teague" (Opp'n 6), because (as Kenyon concedes, *see id.*) Dr. Teague's designs were never "demonstrated to actually work," and were not commercially feasible. Indeed, the testimony Kenyon cites for this argument is actually testimony from Reynolds' own expert about how Dr. Teague's designs were *not* commercially feasible alternatives. Opp'n App. 7.

Kenyon is equally wrong (Opp'n 6-7) to claim that the jury could have found Reynolds liable for failing to supplement its cigarettes with more reconstituted tobacco. Here, too, the testimony Kenyon cites consists solely of statements from Reynolds' own witness explaining why adding more reconstituted tobacco to cigarettes is *not* a feasible alternative. *Id.*[2] The claim that Reynolds could have been found liable for failing to utilize an alternative flue-curing process (Opp'n 7-8) fares no better. Again, the

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[2] The testimony is that Reynolds pioneered reconstituted tobacco and, for nearly fifty years, has used as much reconstituted tobacco in its products as possible. Opp'n App. 4-6. The only reason Reynolds does not add more is because any additional reconstituted tobacco would "alte[r] the taste characteristics [of cigarettes] and it's really not acceptable." Opp'n 7 (quoting Opp'n App. 5-6). In other words, including additional reconstituted tobacco in cigarettes would destroy the commercial feasibility of Reynolds' product because smokers would not smoke this product.

sole evidence on this point is testimony Reynolds elicited from its own expert showing that Reynolds implemented an alternative flue-curing process as soon as it was a safe and commercially feasible alternative. *See* Opp'n App. 8-12. Thus, far from proving that Reynolds failed to implement a safer alternative design, this evidence shows that Reynolds blazed the trail on design change whenever possible—a reality Kenyon failed at trial to deny.

In short, there can be no doubt, as the trial court itself suggested (Pet. App. 17a), that the conflict preemption question presented is an "appropriate appellate issue" implicated on the facts here.

II. KENYON'S CONFLICT PREEMPTION ANALYSIS IS LEGALLY ERRONEOUS.

The real issue before the Court, the one decided by the lower courts and tucked away at the end of Kenyon's opposition (Opp'n 8-11), is whether the District Court of Appeal and the circuit court erred under this Court's conflict preemption precedent in allowing the jury to impose liability on Reynolds simply for manufacturing cigarettes. In Kenyon's view, the lower courts committed no legal error because federal cigarette and tobacco laws have only an express preemptive effect. *Id.* at 8. For support, Kenyon cites a passage from this Court's decision in *Cipollone* which provides that "the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." 505 U.S. at 517. Kenyon also argues that the Court's decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) ("*Myrick*"), should be read to "reaffirm" that tobacco cases are "governed exclusively" by express preemption. Opp'n 10. Kenyon's legal argument is demonstrably wrong.

Kenyon's reliance on *Cipollone* is misplaced as that case concerned only preemption of state-law claims relating to the *labeling* of cigarettes and the *statements* of tobacco

manufacturers, areas specifically regulated by Congress. *See Cipollone*, 505 U.S. at 512. The Court did not consider, and could not have considered, the preemptive effect of federal law on a claim based simply on the manufacture of cigarettes, as no such claim was before it. *See id.* (identifying relevant claims as failure to warn, express warranty, fraudulent misrepresentation and conspiracy to defraud—not a design defect claim as in this case). Moreover, the case in which the Court actually considered the regulation of cigarette manufacture, *Brown & Williamson*, holds that a ban of cigarette manufacturing impermissibly conflicts with federal policy:

> Congress' decisions to regulate labeling and advertising and to adopt the express policy of protecting "commerce and the national economy . . . to the maximum extent" reveal its intent that tobacco products remain on the market. Indeed, the collective premise of these statues is that cigarettes and smokeless tobacco will continue to be sold in the United States. A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.

Brown & Williamson, 529 U.S. at 139.

In addition, *Cipollone* is inapposite because the Court was not faced, as it is here, with an actual conflict between state and federal requirements. Rather, the Court held that there was "*no* general inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions." *Cipollone*, 505 U.S. at 518 (emphasis supplied).

In all events, this Court's subsequent decision in *Geier* forecloses Kenyon's reading of *Cipollone*. As Reynolds explained in its petition (Pet. 15-16), in *Geier*, the Court specifically considered whether express preemption clauses bar the application of conflict preemption principles and concluded that they do not. *See Geier*, 529 U.S. at 871. In

reaching this conclusion, moreover, the Court cited *Cipollone* for the proposition that "this Court traditionally distinguishes between 'express' and 'implied' pre-emptive intent, and treats 'conflict' pre-emption as an instance of the latter." *Geier*, 529 U.S. at 884 (citing, *inter alia*, *Cipollone*, 505 U.S. at 545, 547-548 (Scalia, J., concurring in judgment in part and dissenting in part)).

Kenyon makes a futile attempt to avoid *Geier* by claiming that it is inconsistent with the Court's earlier decision in *Myrick*. Opp'n 10-11. Far from "reaffirm[ing]" that tobacco cases are "governed exclusively" by express preemption (Opp'n 10), *Myrick* provides that conflict preemption principles can apply in tobacco cases:

> As an initial matter, we must address the argument that we need not reach the conflict preemption issue at all. According to respondents and the Court of Appeals, *Cipollone* held that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute. *This argument is without merit.*
>
> ***
>
> The fact that an express definition of the preemptive reach of a statute "implies"—i.e., supports a reasonable inference—that Congress did not intend to pre-empt other matters does *not* mean that the express clause entirely forecloses any possibility of implied pre-emption. Indeed, just two paragraphs after the quoted passage in *Cipollone*, we engaged in a conflict pre-emption analysis of the [1965 Act] and found "no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions." Our subsequent decisions have not read *Cipollone* to obviate the need for analysis of an individual statute's pre-emptive effects.

514 U.S. at 287-89 (internal citations omitted) (emphasis supplied). There is thus no support for Kenyon's incredible claim—accepted by the Florida courts below—that conflict preemption is inapplicable in tobacco cases. This Court's existing precedent holds exactly the opposite.

CONCLUSION

The petition should be granted, and either the Florida Second District Court of Appeal's decision should be summarily reversed or the Court should hear argument on the question presented.

Respectfully submitted,

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